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No. 21307

United States Court of Appeals
FOR THE NINTH CIRCUIT

3435

V. 3435

**FLUOR CORPORATION, LTD,
ET AL**

No. 21307

UNION TANK CAR COMPANY

No. 21307 A

**DRAGOR SHIPPING CORPORA-
TION, a corporation, formerly Ward
Industries Corporation,**

No. 21307 B

*Appellants
Cross Appellees*

vs.

**U. S. A., EX REL MOSHER STEEL
COMPANY,**

No. 21307 C

*Appellee
Cross Appellants*

**OPENING BRIEF OF CROSS APPELLANT
UNITED STATES OF AMERICA FOR THE
USE OF MOSHER STEEL COMPANY AND
MOSHER STEEL COMPANY**

**Upon Appeal from the District Court of the United
States, for the District of Arizona**

**LOCKE, PURNELL, BOREN, LANEY &
NEELY**

**36th Floor Republic National Bank Tower
Dallas, Texas**

and

**CUSICK, Watkins & Stewart
709 Valley National Building
Tucson, Arizona**

FILED

JUL 20 1967

**CHARLES G. PURNELL
FRANK H. WATKINS
Of Counsel**

WM. B. LUCK, CLERK

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No. 21307

United States Court of Appeals
FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD,
ET AL

No. 21307

UNION TANK CAR COMPANY

No. 21307 A

DRAGOR SHIPPING CORPORA-
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No. 21307 B

Appellants
Cross Appellees

vs.

U. S. A., EX REL MOSHER STEEL
COMPANY,

No. 21307 C

Appellee
Cross Appellants

OPENING BRIEF OF CROSS APPELLANT
UNITED STATES OF AMERICA FOR THE
USE OF MOSHER STEEL COMPANY AND
MOSHER STEEL COMPANY

Upon Appeal from the District Court of the United
States, for the District of Arizona

The plaintiff-appellee, United States of Ameri-
ca for the use of Mosher Steel Company, and Mosher
Steel Company as cross-appellants, cross appeal
from that portion of a final judgment in its favor,
dated and entered May 24, 1966, against the defend-

R refers to Record on Appeal

RT refers to Reporter's Transcript of Testimony

ants Fluor Corporation, Ltd.; Federal Insurance Company; Vigilant Insurance Company; Insurance Company of North America; General Insurance Company of America; Seaboard Surety Company; America Re-Insurance Company; Employees' Re-Insurance Group, and General Re-Insurance Group (hereinafter called "Sureties"), in the sum of \$246,165.96 together with interest at the rate of six percent per annum from May 24, 1966 until paid, and against Defendants Dragor Shipping Corporation, formerly Ward Industries Corporation, and Union Tank Car Company in the sum of \$268,882.92, with interest at the rate of six percent per annum from May 24, 1966 until paid, which judgment as aforesaid fails to award pre-judgment interest to the plaintiff.

JURISDICTIONAL STATEMENT

Jurisdiction of the cross appeal exists by virtue of Sections 1291 and 2107, Title 28, U.S.C. Jurisdiction in the District Court exists by virtue of Sections 270(a) and (b) of Title 40, U.S.C., commonly known as the Miller Act, as to Count I of the Amended Complaint, and upon Section 1332, Title 28 U.S.C., on Counts II through VII of the Amended Complaint. (R. 2, p. 268). The court, in its Conclusions of Law No. 1 (R. 6, p. 1237), found jurisdiction asserted by the plaintiff against all defendants. None of the defendants attacked the jurisdiction of the District Court.

STATEMENT OF THE CASE

The Use Plaintiff, Mosher Steel Company, brings this action against defendants Union Tank Car Company, Ward Industries, Inc. and Fluor

Corporation, Ltd., and the sureties, for \$298,336.58, which it claims is owing it for fabricating certain steel, for furnishing certain steel and for freight charges relating to the delivery of steel used and incorporated in the Titan II Missile Sites, Tucson, Arizona Project, covered by Fluor's contract, Union's subcontract, and IMI-Ward's subcontract, and also to recover from defendants Union and Ward the sum of \$22,716.96, which it claims is owing to it for fabricating and furnishing steel and for freight charges in connection with delivering steel used and incorporated into the work at Vandenberg A.F.B. Project covered by Matich Bros. and Sundt's contract, Union's subcontract and IMI-Ward's subcontract. (Findings of Fact No. 13, R. 6, p. 1223).

The court, sitting without a jury, made 52 Findings of Fact and 15 Conclusions of Law which are cited to the record in the trial court and appear in the record in this court (R. 6, pp. 1220-1240). All references in the court's Findings and Conclusions specifically refer to exhibits in evidence or pages of the reporter's transcript of testimony. After taking the case under advisement the court entered judgment (R. 6 p. 1241) against the defendants in accordance with its Order for Judgment dated May 24, 1966 (R. 6, 1240).

For the purpose of this limited cross appeal on the interest matter, the facts pertinent to this cross appeal are set out in digested form, anticipating that the parties will present a fuller statement of the case and pleadings in the appellants' and appellee's briefs.

After the entry of judgment the plaintiff filed a motion pursuant to Rules 52 and 59 of the Rules of Civil Procedure, moving that the court make an ad-

ditional finding that the charges of the plaintiff for the Tucson job were in the liquidated sum of \$298,336.58, and for the Vandenberg job in the liquidated sum of \$22,716.96, and by amending Conclusion No. 15 to read as follows:

Plaintiff is entitled to interest at the rate of 6% per anum beginning thirty (30) days after February 28, 1962, after deducting from the sums due the plaintiff and as set forth in Conclusions 12 and 14, the sum of \$52,170.62, which credit is the agreed value of the stock credit mentioned in Conclusion 13 of the Court dated May 24, 1966.

The plaintiff further moved to amend the judgment to provide for interest in accordance with the proposed amended Finding and Conclusion (R. 6, p. 1266).

By minute entry order of June 20, 1966, the court denied the plaintiff's Motion to Amend, as aforesaid (R. 7, p. 1695).

Within the time prescribed, the plaintiff filed its cross appeal to this court (R. 6, p. 1379), with an appeal bond for costs (R. 6, p. 1380).

SPECIFICATION OF ERROR

The District Court erred in denying cross-appellant Mosher's Motion to Amend the Findings, Conclusions and Judgment to provide for pre-judgment interest commencing thirty (30) days after February 28, 1962.

THE ISSUE PRESENTED BY THIS CROSS APPEAL

The plaintiff-cross appellant's (hereinafter called Mosher) cause of action is based upon its claim for steel fabricated, furnished and delivered to the missile sites near Tucson, Arizona and Vandenberg A.F.B., California. For the Tucson job com-

plete terms, prices and conditions were negotiated with Mosher. (Finding No. 21; R. 6, p. 1226) (RT. 194; Pltf's. Ex. 1 in Evidence). For the Tucson and Vandenberg jobs the two purchase orders (Jt. Ex. 9 and 10 in Evidence) form the basis for the charges. Finding No. 41 (R. 6, p. 1233) computes the gross amounts owed for the Tucson job in the sum of \$298,336.58, and for the Vandenberg site in the sum of \$22,716.96. (Jt. Ex. 14 in Evidence). Conclusions of Law 1 through 15 (R. 6, pp. 1237-1240) impose liability, except for the interest sought in this cross appeal, upon each and every defendant mentioned in said Order of Judgment.

Mosher, because of its error in not billing by sites and levels, rebilled and sent new invoices to IMI-Ward, completing this task on January 19, 1962 (Finding No. 46) (R. 6, p. 1235; RT. 366-367). Thereafter billing was made by sites and levels and the last invoice is dated February 28, 1962 (Jt. Ex. 14, 17 and 18 in Evidence). Mosher has conceded in its Motion to Amend (R. 6, p. 1264) that since the terms were "net 30 days" the court may allow interest to commence 30 days after the date of the last invoice of February 28, 1962.

The court, in Finding No. 53 (R. 6, p. 1237) finds that by stipulation of parties *at the trial* (emphasis supplied) that the sum of \$52,170.62 (RT. 682) shall be the value of the IMI stock received by Mosher by order of the Referee in Bankruptcy pursuant to a Plan of Arrangement. The court, in Conclusion No. 13 (R. 6, p. 1239) stated that the defendants were entitled to a credit in the amount of \$52,170.62 upon their respective obligations to Mosher, that amount being the agreed value of the stock received by Mosher in the bankruptcy proceedings.

The court, in Conclusion No. 15 (R. 6, p. 1240) stated:

“Inasmuch as Mosher’s claims against all parties are unliquidated until judgment is entered, no interest is recoverable prior to the entry of judgment herein.”

ARGUMENT

SOLE POINT

It is urged that the court, in its Conclusion No. 15 (R. 6, p. 1240) has erred in declaring that Mosher’s claims against all parties are unliquidated until judgment is entered, and that no pre-judgment interest is allowed. Mosher’s position is that the sums were liquidated when invoiced.

This case was tried by all parties upon the theory that the amounts sought in Mosher’s Complaint were not in serious dispute. The dispute arose as to which defendant was liable. Harle picked up the invoices on February 16, 1962 in Dallas, checked them over with Frank Wright, found nothing that he (Harle) and Wright differed on (RT. 924) and agreed with Wright that Mosher’s work had been completed and properly performed (RT. 924) and stated “it was an excellent job.”

All of the parties hereto could easily calculate the amount due Mosher from the evidence. By way of illustration Union’s Tom Harle testified that he was able to compute the amount due on the “first shipment” from (1) the legal freight rate in effect; (2) the shipment weight, and (3) by using a multiplier of 8 cents per pound, being the fabrication cost at the rate of \$160.00 per ton for supplied steel. (RT. 885).

The court, in Finding No. 41 (R. 6, p. 1233) has computed the total obligation for the Vandenberg and Tucson jobs in the same amounts sought in the Complaint, being \$22,716.96 and \$298,336.58, respectively. In addition, these amounts are the identical sums set forth in the statements of account, being Joint Exhibits in Evidence 17 (Tucson Job) and 18 (Vandenberg Job). The invoices, being Joint Exhibit 14, are to the exact cent as itemized in the statements of account.

Mosher's Exhibit 1 in Evidence, being the October 16, 1961 letter, the purchase orders (Jt. Ex. 9 and 10), the invoices for Tucson and Vandenberg (Jt. Ex. 14) and Jt. Ex. 17 and 18, being the statements of account, the inbound and outbound freight charges (Pl. Ex. 6), all serve as the means to calculate and ascertain the exact amount due and owing.

Finding No. 51 (R. 6, p. 1236) finds that the Miller Act letter, statements and invoices were sent to Fluor on March 20, 1962. Thus we have all the parties put on notice of the amount due and the non-payment. All Answers to the Amended Complaint do not allege that any amount is incorrect or in dispute. Each defendant, in essence, just denies any legal liability for the sums alleged to be due and owing.

An inspection of the invoices and statements of account (Jt. 14, 17 and 18) shows the invoices to be computed in accordance with the purchase orders and plaintiff's Exhibit 1, with every invoice itemized on the statements. The purchase orders provide that the terms are "Net 30 days". Mosher is willing to concede that the court may allow interest to commence 30 days after the date of the last invoice, being February 28, 1962. It is submitted that this would avoid computing interest on each invoice under the "Net

30 days" provision and is a fair method insofar as the defendants are concerned.

The defendants have not introduced any evidence disputing any portion of the aforesaid amounts. It is therefore the position of Mosher that it is legally entitled to pre-judgment interest from each defendant, at least on the amount entered in the judgment, and commencing thirty (30) days after February 28, 1962 until paid.

Pre-judgment interest in the Federal Courts is allowable in accordance with the law of the state where the contract is to be performed.

See: U. S. for use of *Weston and Brooker Co. v. Continental Casualty*, 303 F.2d 91 (4 CA). In this case (a Polaris Missile case) the invoices of the materialmen made payment due upon delivery. The court therein said:

"Thus we have a case for a sum certain or at least capable of being reduced to a certainty and payable at definite or definitely ascertainable dates.

"We think the judge could have allowed interest under South Carolina law from the date of each invoice since by their terms they were payable on delivery, and under the terms of this bond (Miller Act) the surety is bound in like manner as the principal. * * * Clearly the court was within the law of South Carolina in allowing interest from thirty days after the final invoice date."

In U. S. for use of *Carter-Schneider-Nelson Corporation V. Campbell*, 293 F.2d 816 (9 CA) the court, under California law, said: "Such pre-judgment interest is recoverable only if damages are certain or capable of being made certain by calculation." This rule is followed in the Arizona case of

United States F. & G. Co. v. California-Arizona Const. Co., 21 Ariz. 172, 186 P. 502, wherein the court said:

“It is apparent, therefore, that this is not a case where the amount of the recovery, if recovery be had, was definitely fixed by agreement of the parties or capable of ascertainment by mere computation. In that class of cases, in the absence of special contract, the *general rule is that interest should be computed from the time the debt became due.*” (emphasis supplied).

The Arizona court, in *Palmcroft Development Co. vs. City of Phoenix*, 46 Ariz. 400, 51 P.2d 921, stated that when debts are due they bear interest at the legal rate and in regard to a “liquidated” debt said:

“The debt is a liquidated debt and under the general rule bears interest from the date it should have been paid. Where there is no agreement for interest, interest is allowed as damages for the withholding of the money from the creditor after it is due and is, we believe, universally fixed at the legal rate.”

In the case of *Continental Oil Company v. U. S.*, 184 F. 2d 802 at page 822 (9 CA), the court stated:

“* * * since the amounts found were fixed and ascertainable we think the award of interest was justified under either rule.”

The term liquidated has been judicially defined to mean that the amount due has been ascertained and agreed upon by the parties or is fixed by operation of law. See: 25 Word and Phrases, pages 542, et seq.

The Arizona Code section on interest, 44-1201 A.R.S. 1956, reads as follows:

“A. Interest for any legal indebtedness shall be at the rate of six dollars upon one hun-

dred dollars for a year, unless a different rate is contracted in writing.”

In the case of *J. F. White Engineering Corp. v. U. S. for the use of Pittsburg Plate Glass*, 311 F.2d 410 (10 CA), the court sustained an award of interest to a subcontractor who had substantially complied from the date that the balance became due.

In the case of *Continental Casualty v. Allsop Lumber Co.*, 336 F.2d 445 at 458 (8 CA), the court indicated that the contract and the invoices provided for interest at 6% if payment is not made within 30 days after payment is due and remanded the case to the District Court to provide for prejudgment interest.

In the case of *Sam Macri and Sons, Inc. v. U. S. A. for the use of Oaks*, 313 F.2d 119 (9 CA), this court therein affirmed the allowance of interest on an amount admittedly due under subcontract from the date the amount became due even though the prime contractor's unliquidated counterclaim exceeded that amount. After trial the amount of the counterclaim actually sustained was less than the judgment awarded the subcontractor. This situation is similar to the credit of \$52,170.62 allowed in Finding No. 52 (R. 6, p. 1237).

The court also stated in the Macri case that the surety's liability coincides in time with that of the principal, and does not begin, as to interest, when demand is made.

A more recent Ninth Circuit Court case is *American Surety Company of New York v. United States of America For the Use and Benefit of B & B Drilling Company*, 368 F.2d 475 (1966) 9 C.A. This Miller Act action involved a claim certain which was re-

duced by reason of an unliquidated setoff for counterclaim thereto. This court stated therein at 479:

“Of course the set-offs which were allowed to McBride were for amounts which were unliquidated. That, however, does not alter or diminish the plaintiff's right to recover the interest which was here allowed. It is a general rule that where the amount of a claim is certain, as here, but is reduced by reason of an unliquidated set-off or counterclaim thereto, interest is properly allowed on the amount found to be due from the time it became due and was demanded.”

It is urged that this case and the Macri case are presuasive of Mosher's position that pre-judgment interest is allowable in this action.

CONCLUSION

The District Court erred in failing to grant Mosher prejudgment interest, and it is respectfully submitted that the judgment should be amended or modified to provide for interest at the rate of 6% per annum commencing thirty (30) days after February 28, 1962.

Respectfully submitted,

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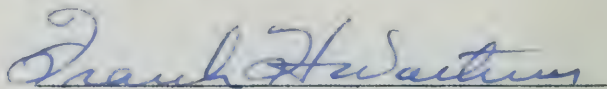
CHARLES G. PURNELL

FRANK H. WATKINS

Of Counsel

CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in blue ink, reading "Frank H. Watkins", is written over a horizontal line.

FRANK H. WATKINS, *Attorney*

No. 21307

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD.,

ET AL

UNION TANK CAR COMPANY

WARD INDUSTRIES CORPORA-

TION, now known as DRAGOR

SHIPPING CORPORATION,

Appellants

Cross Appellees

vs.

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COMPANY,

Appellee

Cross Appellant

No. 21307

No. 21307 A

No. 21307 B

No. 21307 C

BRIEF OF APPELLANT
UNION TANK CAR COMPANY

FILED

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No. 21307
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD.,
ET AL
UNION TANK CAR COMPANY
WARD INDUSTRIES CORPORA-
TION, now known as DRAGOR
SHIPPING CORPORATION,

Appellants
Cross Appellees

vs.

U.S.A., EX REL MOSHER STEEL
COMPANY,

Appellee
Cross Appellant

No. 21307
No. 21307 A
No. 21307 B
No. 21307 C

BRIEF OF APPELLANT
UNION TANK CAR COMPANY

Upon Appeal from the District Court of the
United States for the District of Arizona

This is an appeal by defendant Union Tank Car Company (Union) from judgments requiring Union to pay plaintiff Mosher Steel Company (Mosher) \$268,882.92 for steel fabrication work undertaken for the defendant Ward Industries Corporation (Ward) and its joint venturer Idaho-Maryland Industries, Inc. (IMI). The material fabrication was ordered by the joint venture for use in performance of a second-tier subcontract with Union on the missile launch facilities, Titan II, Phase II, constructed near Tucson, Arizona and Lompoc, California. Union paid the joint venture

for the steel fabrication work but neither Ward nor IMI ever paid its subcontractor Mosher. Now the court below has held that Union is liable to pay for the same steel work a second time.

JURISDICTIONAL STATEMENT

The jurisdiction of the court below with respect to Mosher's claim for relief against Union was based on diversity of citizenship, the amount in controversy exceeding \$10,000 (28 U.S.C. § 1332). Mosher is a Texas corporation having its principal place of business in the State of Texas (R. 268, 1220).¹ Union is a New Jersey corporation having its principal place of business in the State of Illinois (R. 272, 1221).

On May 24, 1966, the court below entered findings of fact and conclusions of law and a judgment holding Union and Ward liable to Mosher in the amount of \$268,882.92 as payment for the steel Mosher fabricated and delivered to the IMI-Ward joint venture (R. 1220, 1241). The court in the same judgment also held Fluor Corporation, Ltd. (Fluor) and its sureties liable to Mosher for \$246,165.96 under the provisions of the Miller Act, 40 U.S.C. §§ 270(a) and (b). On June 2, 1966 Union filed a motion requesting the court below to amend and make additional findings of fact and conclusions of law, to alter and amend the judgment, or to grant a new trial (R. 1242, 1244). The motion was denied on June 20, 1966 (R. 1695).

¹ The following abbreviations are employed in this brief: R. for Record on Appeal; R.T. for Reporter's Transcript of Proceedings. Counsel prior to trial stipulated to the admission in evidence of certain documents as joint exhibits identified herein as Jt.Ex. The remaining exhibits introduced in evidence by Mosher, Ward, and Union are respectively identified as M.Ex., W.Ex., and U.Ex. See exhibit appendix at conclusion of brief.

On June 20, 1966, the court below entered a second judgment denying Union's counterclaim (R. 1345). The counterclaim prayed that in the event Union as well as Ward were held liable to Mosher, plaintiff be required first to seek satisfaction of any judgment from Ward as the defendant primarily responsible for payment of Mosher's claim (R. 295). The court entered no findings of fact or conclusions of law in dismissing the counterclaim.

Union filed a notice of appeal from each of the above judgments on July 18, 1966 (R. 1371). Jurisdiction of this Court to review the judgments of the court below is invoked pursuant to 28 U.S.C. §§ 1291 and 2107 and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Contractual Relationships Between Defendants

In June, 1961, Union's Graver Tank & Mfg. Co. Division received two first-tier subcontracts for Phase II work on the Titan II missile launch facilities under construction in Arizona and Southern California. One contract, in the amount of \$16,500,000 was awarded by Fluor and covered work at Davis-Monthan Air Force Base, Tucson, Arizona (Jt.Ex. 2). The second contract, in the amount of \$2,600,000 was awarded by Matich Bros. and M. M. Sundt Construction Corporation (Matich-Sundt) and covered work at Vandenberg Air Force Base, Lompoc, California (Jt.Ex. 4). The subcontracts were initially evidenced by interim agreements under which the work was performed until formal contract documents were prepared and executed on September 8, 1961.

Following the awards, Ward and IMI agreed to organize a joint venture for the purpose of undertaking

a second-tier subcontract for Union's Graver Division covering a substantial portion of the steel fabrication work included under Graver's contracts with Fluor and Matich-Sundt (U.Ex. A). IMI was a California based construction company with its principal place of business at Studio City (U.Ex. A). It also operated a steel fabrication plant at Denver, Colorado known as its Denver Steel & Iron Division (W.Ex. A-1 through A-4).

The IMI-Ward joint venture was established on July 28, 1961, with the execution of a joint venture agreement (U.Ex. B, Jt.Ex. 7). It provided that the obligations of the venturers under their subcontract with Graver would be joint and several and that they would share equally in any profits, losses, or liabilities of the enterprise (Jt.Ex. 7). It also provided that the joint venture affairs would be conducted by a committee composed of IMI and Ward representatives. Subject to the direction of the committee, performance of the work was placed under the control and direction of IMI's president, George J. Morton, who was designated joint venture manager (Jt.Ex. 7).

On August 23, 1961, IMI and Ward executed a letter agreement with Graver, covering the second-tier subcontract work undertaken by the joint venturers (U.Ex. S). The letter agreement, like Graver's interim agreements with Fluor and Matich-Sundt, was subsequently replaced by a formal subcontract document executed as of October 23, 1961 (Jt.Ex. 8). The subcontract provided that IMI-Ward was to receive from Graver as the contract price the sum of \$8,524,000 less the cost of Graver-supplied material (Jt.Ex. 8). Of this sum, \$7,971,000 was applicable to work at Davis-Monthan and the balance of \$553,000 was applicable to work at Vandenberg (R. 1223). Included in the work to be performed by the joint venture was the steel fabrication on the blast locks and on platform

levels 2 and 3 for the eighteen missile silos at Davis-Monthan and the five missile silos at Vandenberg (Jt.Ex. 8). This was the fabrication work actually performed by Mosher (Jt.Ex. 9 and 10).

Under the terms of the IMI-Ward second-tier subcontract Graver agreed to supply certain plate or raw steel required by IMI-Ward in performing its fabrication work, the cost of such steel to be deducted by Graver from sums becoming due the joint venture (Jt.Ex. 8). Pursuant to this provision a steel procurement procedure was established whereby IMI's Denver Steel & Iron Division manager, Sam A. Wilson, negotiated directly with the mills concerning the terms of a prospective steel purchase (R.T. 221-2, R. 1225). Once negotiations were concluded, the joint venture prepared and sent a written requisition to Graver specifying the steel supplier, the kind and grade of steel, the price, and the inspection and delivery requirements (R.T. 192, 211-12, 222). Graver in turn issued a purchase order to the steel supplier in conformity with the joint venture requisition (R.T. 905, 945-6, 573-4). Following receipt of Graver's purchase order the mill shipped the steel and billed Graver on the sale. Graver, upon making payment, charged the same against the joint venture subcontract price (R.T. 212, 221).

When Wilson or other joint venture representatives handled the preliminary negotiations, the mill representatives were advised that the ultimate purchase order would be issued by Graver (R. 1225). In no instance did an IMI or joint venture officer ever purport to issue a purchase order or to enter a contract with a steel supplier in Graver's name (R.T. 222). That purchase order commitment was made exclusively by a representative of Graver (R.T. 224-5).

Mosher Negotiations

Through this procedure substantial quantities of steel had been purchased and sent to the Denver Steel & Iron Division yards by October, 1961 for expected use in fabrication work assigned to that Division by the joint venture (R.T. 183). The Division, however, was encountering difficulty in completing fabrication in time to meet the field schedule at Davis-Monthan (R.T. 180). Joint venture manager Morton, therefore, gave Wilson the task of locating subcontractors willing to perform a part of the joint venture's fabrication work (R.T. 997).²

The joint venture thereafter set up a meeting on October 11, in Denver, at which time Graver "was brought into the picture" in order to secure its approval of Mosher as a prospective subcontractor (M.Ex. 39, P. 22).³ Such approval was given by Graver's Tucson project manager, Lionel Lancaster, who agreed that the joint venture might negotiate a subcontract with Mosher covering the levels 2 and 3 and blast lock material fabrication for Davis-Monthan (R.T. 185).

On October 13, Wilson travelled to Mosher's Dallas

² Morton testified that, "At the time it was decided to subcontract, Sam Wilson was given the task of locating the subcontractor. He advised me that Mosher had the capacity to handle this work, that they were interested, and that he would like to go to the Mosher plant, meet with the Mosher people and see whether or not he could negotiate a satisfactory contract. I gave him permission to do so and told him to report back to me what he could do — what the terms of this agreement would be and the terms of what it would cost us to have this work done" (M.Ex. 39, p. 20), (R.T. 997).

³ The subcontract provided that all joint venture subcontractors and suppliers were subject to approval by Graver. This provision was included because a similar contractual requirement was imposed upon Graver by Fluor and Matich-Sundt and upon those prime contractors by the Corps of Engineers (Jt.Ex. 1-4). As a result, Graver was necessarily consulted whenever the joint venture engaged a subcontractor or supplier (R.T. 506-7).

plant and met with Mosher's senior contracting engineer, Paul Mitchell, and its vice president, Ralph Burton (R.T. 61). Wilson and Mitchell were business acquaintances and the latter knew Wilson was IMI's Denver Steel & Iron Division manager (R.T. 59, 116). No Graver representative was present (R.T. 71). At the meeting the parties reviewed the proposed Davis-Monahan fabrication work and discussed terms, prices, and conditions on which Mosher would be prepared to perform the work (R.T. 66, 71). Although he had no authority to do so, Wilson also told Mitchell and Burton that a Graver purchase order would be issued to cover the material fabrication (R.T. 191).

After the meeting Mosher set up a shop order on its books showing Graver as the prospective customer (Jt.Ex. 12, R.T. 351). Mitchell also prepared and sent Wilson a letter covering Mosher's proposal for the work (M.Ex. 1, R. 1226). The second paragraph of the October 16 letter stated (M.Ex. 1):

"It is agreed that a formal purchase order will be forthcoming from Graver Tank & Manufacturing Company to cover the fabrication of this material. In the interim it would be appreciated if you would review the conditions of this order as outlined below and return two copies of this letter signed as indicated at the bottom of the letter."

At the bottom of the letter was a provision for acceptance which, after Wilson signed it, read as follows:

"Accepted:

Denver Steel and Iron Works Company

For Graver Tank and Manufacturing Company

By S. W. Wilson

Title Division Manager

Dated October 20, 1961"

Wilson signed the foregoing letter as IMI's Division Manager without authority and without consulting his

superior Morton or any Graver representative (R.T. 223, 224).⁴ The signed letter reached Mosher on October 26 (R.T. 26). Unsigned copies were sent to Graver and to the joint venture's main office at Studio City. (R.T. 214, 509, 801).

As soon as Wilson's action came to his attention, Morton objected to handling the transaction on the basis of a purchase order from Graver because it entailed a loss of profit to the venture. IMI-Ward received a greater price for steel fabrication from Graver than Mosher was to receive under the proposal negotiated by Wilson (R.T. 243). As a result, Morton took the position that, "At no time was Mosher to deal directly with Graver in the matter of this subcontract" (M.Ex. 39, p. 33). The joint venture therefore issued no requisition to Graver.

Graver's contract engineer, R. R. Branting, raised a similar objection when a copy of Wilson's letter reached Graver's office in Chicago (R.T. 509-10, 534). Unlike the situation with respect to raw steel procurement, no agreement or procedure existed for issuing Graver purchase orders on fabrication work undertaken by the joint venture (R.T. 535, U.Ex. G). Accordingly, Branting immediately wrote Graver's Tucson project manager, Lancaster, stating (U.Ex. G):

"It was my understanding that Denver Steel was to subcontract the work which had not been handled in their own shop, not to commit Graver to pull their chestnuts from the fire."

"The establishment of a plan whereby Graver

⁴ Wilson testified that at the October 11 Denver meeting Lancaster had said that a purchase order would be forthcoming provided Wilson could negotiate a satisfactory deal (R.T. 234). He admitted, however, that no Graver officer in this instance or any other had authorized him to sign either a preliminary or any other type of agreement in Graver's name (R.T. 212, 224, 226).

will or will not subcontract work taken from IMI shops would appear to be advantageous. A thoroughly documented, definite understanding now may prevent some unpleasant surprises later on. To my knowledge no such understanding exists or has been initiated. Unless some procedure is established, Graver may find itself committed to two or more sources for the same items."

In response to Branting's letter Lancaster immediately wired in reply (U.Ex. M):

" . . . concerning letter from Mosher Steel to Sam Wilson indicating that a final purchase order would be forthcoming from Graver Tank & Mfg. Co. to cover material fabrication. This was taken care of directly and immediately with George Morton. Mosher has received a purchase order direct from Idaho-Maryland Industries, Inc. and Graver Tank and Mfg. does not enter into it"

The October 31 Meeting at Dallas

As Lancaster's telegram indicated, Morton immediately advised Mosher that the fabrication work would not be covered by a Graver purchase order. For this purpose he sent the venture's chief contracting officer, Wallace Orr, and its Tucson construction manager, Bill Holmes, to meet with Mosher's officials in Dallas on October 31 (R.T. 791). At the meeting, at *which no Graver representative was present*, Orr and Holmes requested Mosher to accept a joint venture purchase order for the Davis-Monthan work described in Mitchell's October 16 letter and also to accept a further joint venture purchase order for about \$25,000 of additional fabrication work on the Vandenberg job (R.T. 89, 742-6). *This was the first time the Vandenberg work was discussed with Mosher.*

Regarding financial capacity, Orr and Holmes pointed out to Mosher that this was not a negotiation

for IMI, but rather for the IMI-Ward joint venture, and that current Dun & Bradstreet reports showed Ward enjoyed a net worth of about \$11,000,000 (R.T. 795). Orr and Holmes left the meeting with the understanding that Mosher would undertake the work on joint venture purchase orders (R.T. 796-71, 814).

On November 3, IMI-Ward's purchasing officer, Frank Wright, prepared and sent two joint venture purchase orders to Mosher pursuant to instructions from Orr (Jt.Ex. 9 and 10, R.T. 797-8). One order covered the Davis-Monthan work described in Mitchell's October 16 letter signed by Wilson (Jt.Ex. 9). The other order covered the additional Vandenberg work first discussed by Orr and Holmes at the October 31 meeting in Dallas (Jt.Ex. 10).

Graver's comptroller, John Page, learned of the Orr and Holmes meeting with Mosher through a memorandum from Graver's project expediter, Harle, which reported, "To my knowledge, at present, Denver Steel & Iron is going to place an order with Mosher, the payment of which may have to be guaranteed by Graver" (Jt.Ex. 20). Page immediately telephone IMI's comptroller and joint venture committee representative, Vernon John, in order to clarify Harle's report (R.T. 518-20). A contemporaneous memorandum of that conversation was prepared, which stated (U.Ex. K):

"[Mr. Page] immediately called Vernon John of IMI-Ward to clarify [Harle's memorandum]. The gentlemen negotiating for IMI-Ward with Mosher was in Mr. John's office when the call went through. He assured Mr. John that Mosher was no longer requesting that Graver guarantee payment. *Mr. Page told Mr. John that he, Page, did not have authority to guarantee such payment, and that guarantee would be considered only upon the written request of Mr. John which must include an*

agreement that any payment made by Graver to Mosher would then be withheld from IMI-Ward's progress payment." (Emphasis supplied.)

Wallace Orr, IMI-Ward's contracting officer, testified (R.T. 799) that he was in John's office when this call was made.

On November 7, Graver's expediter, Harle, visited Mosher's office in Houston in order to ascertain when the first items of fabricated steel for IMI-Ward would be arriving at Davis-Monthan (R.T. 914-5, 936, 265). He was advised that the first shipment would be ready in about a week (R.T. 267). Mosher's treasurer, Mr. Moore, told Harle that shipments would be released only upon confirmation that Graver would be responsible for assuring payment (R.T. 354-5). Harle suggested to Moore that the latter telephone Graver's controller, Page, in Chicago in order to discuss Mosher's requirements. During the telephone conversation, Moore told Page that he "had agreed to accept IMI-Ward's purchase order" (R.T. 269). However, Moore went on to declare that delivery would be made only upon the understanding that "if we were not paid within the terms of the sale that they [Graver] would have to be responsible for paying Mosher Steel Company" (R.T. 355). Page informed Moore that before any consideration could be given that request Morton's approval would first have to be secured (R.T. 356).

Page-Moore Telephone Conversation of November 15

Eight days later, on November 15, Moore again called Page in connection with the same subject. The call was made after Harle's further inquiry (R.T. 267, 271, 276) concerning Mosher's first item of fabrication work now scheduled for shipment on November 15 or 16 — an item costing approximately \$7,255 (R.T. 885-6).

It was this November 15 telephone conversation between Page and Moore on which the court below predicated Union's liability in this action.

With respect to the November 15 telephone conversation, Page testified that Moore was seeking Graver's guarantee of not only the November 16 shipment but in addition on all subsequent shipments which would be made under the joint venture's Davis-Monthan purchase order. Page declared that he orally agreed to guarantee payment of the item scheduled to be released the following day but advised Moore that a guaranty of the joint venture's entire Davis-Monthan order would have to be cleared with his superiors at Union (R.T. 742-8). Page stated, "As best I recall it, Mr. Moore wanted a guarantee by Graver of the payment of the shipments of material that would be made to Tucson for the account of this IMI-Ward Joint Venture. I told him I would guarantee payment right then and there over the telephone of the one shipment that was ready. And I would find out what I could do about the rest of it. This probably meant that I would think about it and talk to the higher ups in Union Tank Car and see if we could guarantee it, the whole thing" (R.T. 742, 744). Page further told Moore that as to "the rest of it I would consider and find out what I would do and write him a letter" on the matter (R.T. 759, 745, 747).

Page's account of the conversation was confirmed by a telegram sent to Mosher the same day in which Page stated (Jt.Ex. 22):

"Please accept this wire as guaranty of Idaho-Maryland payment to you on your November 16 shipment. Complete details will follow in letter early next week."

Moore acknowledged that he received Page's telegram on November 16 but denied that the telegram

represented the substance of the telephone conversation on the preceding day (R.T. 411). Moore testified on deposition examination⁵ and at trial that he understood that Mosher was to have a guaranty of the entire Davis-Monthan order (R.T. 415).

Moore stated in his deposition that during the conversation Page told him that he had received Morton's approval for an arrangement whereby Graver would pay in the event IMI-Ward failed to pay the account on time. Moore testified, "I asked him what — had he gotten approval from Morton so we could proceed with the order, that the service department wanted a release on it, and he said he had gotten approval of Morton and that they would pay us direct if we did not receive the money and withhold the money, of course, from IMI-Ward, the amount that they paid us." (U.Ex. UUUU, p. 27). When asked whether his understanding was that Union should pay only if the joint venture did not pay, Moore answered, "Yes, if we were not paid on time by the joint venture" (U.Ex. UUUU, p. 33). Summing up his testimony, counsel asked Moore if the understanding was, ". . . if the joint venture didn't pay you, that they [Graver] would be in a position to withhold money and pay you direct, is that correct?" Moore answered, "Correct" (U.Ex. UUUU, p. 35).

At the trial Moore testified on direct examination that he told Mr. Page that Mosher had to have assurance "that if we were not paid within the terms of the sale that [Graver] would be responsible" (R.T. 355). Moore declared, "I did tell Mr. Page that we were practically ready to make the first shipment on this and we had to have something definite about the payment for the fabricated material. And I asked him if he had gotten

⁵ The portions of Moore's deposition to which reference is made in this brief were read into evidence pursuant to F.R.C.P. Rule 26(d).

approval from Mr. Morton for them to pay us direct and deduct it from the contract. He said that he had talked to Mr. Morton and that Mr. Morton had given him approval.⁶ And he stated that he would write me a letter in a day or two, outlining this agreement by Mr. Morton for payment of this material" (R.T. 362).

Moreover, on cross-examination Moore again admitted that he told Page that his company wanted an understanding whereby "Graver would agree to pay [Mosher] *if* IMI failed to do so" (R.T. 408). He conceded that during the conversation with Page on November 15, he was "insisting that Graver pay *if IMI-Ward failed to pay* within the terms of the order" (R.T. 409), and that he "had assurance from Mr. Page that the entire account was guaranteed" (R.T. 416). Moore also reaffirmed his deposition testimony that Page had orally promised to pay but only "if we were not paid on time by the Joint Venture" (R.T. 456). Finally, with reference to the letter "outlining this agreement," Moore said that Page promised "to write me a letter in a day or two giving *final approval* on this agreement" (R.T. 301).

Moore also testified that he disregarded Page's telegram guaranteeing the first shipment because he had expected a letter guaranteeing the entire amount (T.R. 415-6). He further admitted that when discussing the proposed guaranty, *neither he nor anyone else at Mosher had talked with Page about the separate Vandenberg purchase order* first discussed with Orr and Holmes on October 31. The conversation with Page related solely to the Davis-Monthan job (R.T. 422).

Immediately after receiving Page's telegram, Moore sent a TWX to Mosher's Houston office advising his

⁶ No such "approval" conversation was recalled by Page (R.T. 706) or testified to by Morton.

subordinate, "I have a wire from Mr. Page. Graver guarantee account of Idaho-Maryland. You may mark it open" (M.Ex. 4). With reference to the telegram and TWX, Moore testified (R.T. 416):

"Q. Now, Mr. Moore, does not that TWX there mean you understood Mr. Page's telegram to be a guaranty of the entire account?"

"A. I understood all the time it was supposed to be a guaranty of the entire amount."

"Q. The telegram was?"

"A. I had assurance from the very beginning. Yes. And I expected the entire amount to be guaranteed."

At no time prior to suit did Moore ever advise Page or any other Graver representative that the telegram incorrectly stated the substance of the November 15 conversation (R.T. 412-6). He also admitted that he never received or requested the letter of "final approval" from Page which supposedly was to guarantee the entire account (R.T. 413-416). Page had previously advised IMI that a guaranty of the account "would be considered only upon the written request" of the joint venture (R.T. 520, U.Ex. K). This "written request" did not reach Graver until December 11, 1961, at which time Page had left Graver's employe and Perry Trytten had been appointed Graver's new comptroller (R. 1231). It authorized Graver "to pay Mosher Steel invoices which will approximate \$225,000 after our acceptance of the work performed by this company" (Jt.Ex. 26).

The following day, Trytten's assistant drafted a proposed letter of guaranty of the joint venture's entire account with Mosher (Jt.Ex. 21). That proposed letter, dated December 12 and addressed to Moore, read (Jt.Ex. 21):

“Reference is made to our wire of November 15, 1961, in which we extended to you our guaranty of Idaho-Maryland Industries-Ward Industries Corp. account for shipments you made on their behalf on or about November 16, 1961.”

“We are now prepared to enlarge this guaranty sufficiently to cover all payments which will become due to you by IMI-Ward for items you furnish them in connection with their sub-contracts under us at Tucson, Arizona and Vandenberg, California.”

Trytten submitted the proposed letter of guaranty for consideration by his superiors. They advised against enlarging Page's November 15 telegram guaranty and suggested that any further guaranty be made only on a shipment-by-shipment basis should Mosher again seek Graver's assurance of payment (Jt.Ex. 24). Trytten accordingly marked the letter “Hold” and placed it unsigned in Graver's files (M.Ex. 36, p. 364).

Invoices Covering Mosher's Work

Following receipt of the joint venture purchase orders Moore authorized Mitchell on November 16 to enter supplements on Mosher's shop order for the Davis-Monthan work for the purpose of changing the customer's name from Graver to IMI (Jt.Ex. 13, R.T. 92). At the same time he also directed Mitchell to enter an original shop order in the name of IMI covering the separate fabrication work on the Vandenberg project (M.Ex. 22-A, R.T. 100-1). Mitchell also obtained from the joint venture 100 IMI-Ward receiving reports which were used by Mosher on shipments made pursuant to the joint venture's purchase orders (Jt.Ex. 44, R.T. 102).

From that date onward, Mosher regularly invoiced the joint venture on all shipments made pursuant to IMI-Ward's November 3 purchase orders (Jt.Ex. 14). *At no time were any invoices sent to Graver* (R.T. 397-

8). In December, 1961, Wright of IMI-Ward advised Moore that Mosher's invoices were not billed by sites and levels as required by the joint venture purchase orders (R. 1235). Mosher consequently rebilled the work and sent new invoices to IMI-Ward on about January 19, 1962 (R.T. 367-381). At no time were copies of these revised invoices sent to Graver (R.T. 400-1, 397-8).

While the fabrication work was under way in its shops, Mosher also accepted numerous change orders from the joint venture increasing the dollar amount of work being done under the November 3 joint venture purchase orders (Jt.Ex. 14, U.Ex. VVV through ZZZ, R.T. 129, 136). Once again, Mosher never gave Graver notice of its acceptance of the change orders and never sent Graver any invoices thereon (R.T. 130, 424).

While Mosher was performing this material fabrication work for IMI-Ward, the joint venture regularly invoiced Graver on a percentage of completion basis for the work covered by its second-tier subcontract (R.T. 520-1, 550-6, U.Ex. CCCC). The invoices covered the items under Section 4 of the subcontract (U.Ex. IIII, JJJJ, R.T. 594) which included the blast lock and levels 2 and 3 fabrication work performed by Mosher (R.T. 555, U.Ex. T-Y). The joint venture assigned its invoices, including those covering work under Section 4 of the subcontract, to the United California Bank in order to secure advances from the bank under previously negotiated credit arrangements (R. 1235, R.T. 593). The bank presented these invoices to Graver and received payment thereon (U.Ex. IIII).

IMI Bankruptcy

By February 2, 1962, payments on IMI-Ward in-

voices and credits for Graver-supplied material had already exceeded the amount due under the progress payment schedule for joint venture work. As of that date Graver had made payments exclusive of material purchases, totaling \$2,359,966 against available items of work totaling \$2,285,182, evidencing an overpayment to the joint venture in the amount of \$74,784 (U.Ex. VV, XX, PPPP, R.T. 622). On that date IMI defaulted in performance of the joint venture subcontract work and filed a voluntary petition in bankruptcy under Chapter XI of the Bankruptcy Act in the United States District Court for the Southern District of California, Central Division (R. 1235).

Because of the bankruptcy and IMI's inability as a joint venturer to proceed with the subcontract work, Graver was obliged to negotiate new arrangements with the IMI-Ward representatives. These arrangements were embodied in two agreements dated February 1 and 5, 1962, which were executed by the three companies concerned (U.Ex. N, M.Ex. 23).

Under the February 1 agreement the IMI representatives relinquished their joint venture management rights to their co-venturer, Ward, which, in turn, assumed the primary responsibility for completing the joint venture subcontract work. Ward then appointed Union as manager for the purpose of completing the subcontract work on behalf of the joint venture. The February 1 agreement expressly provided "that the moneys required to perform the contract described in the joint venture agreement is to be the obligation of Ward Industries Corporation and IMI" (U.Ex. N).

The February 5, 1962 agreement further defined the obligations of the parties under the new management arrangement. It provided that Union would (M.Ex. 23):

“C. Purchase the inventory and work in process, both at the Tucson plant or at the premises of any subcontractors, and to pay for same, if Union has not already done so. The price shall be replacement cost.”

“E. All money so paid shall be charged to the Joint Venture account.”

“F. If an agreement cannot be reached concerning any price, the parties agree to submit to the jurisdiction of the Bankruptcy Court for the purpose of having such amount determined.”

The February 1 and 5 agreements were approved by order of the Bankruptcy Court (M.Ex. 23), and constituted the contracts pursuant to which Graver served as manager in completing the joint venture subcontract work on behalf of IMI-Ward. The contracts were matters of record in the Bankruptcy Court. Subsequent to February 2, 1962, Mosher shipped an additional \$55,000 of fabricated steel pursuant to the joint venture's November 3 purchase orders (R.T. 394).

Bankruptcy Claims

On August 9, 1962, Mosher filed its claim in the Los Angeles Bankruptcy Court. The claim stated that IMI was indebted to Mosher in the amount of \$321,000 by reason of the fabrication of steel for IMI pursuant to the purchase orders issued by that company on November 3, 1961. Of this sum \$55,253 covered fabricated steel delivered after February 2, which sum Mosher claimed as an administrative charge against the debtor (U.Ex. D). A statement of account and supporting invoices were attached to Mosher's proof of claim and disclosed that all items of work had been billed to IMI

(U.Ex. D).⁷ The claim further stated that Mosher was asserting its demand against IMI without prejudice to its rights against Ward and Graver (U.Ex. D).

On December 31, 1962 the Referee in Bankruptcy, pursuant to a plan of arrangement, ordered issued to Mosher as a general unsecured creditor in payment of its claim 642,107 shares of IMI stock (U.Ex. E). IMI thereafter changed its name to Allied Equities Corporation and the stock was actually issued in a 1 to 20 "reverse split" whereby Mosher received 32,105 shares of Allied Equities Corporation stock (R. 1237). The value of this stock was established by stipulation of the parties to this action at \$1.625 per share or a total of \$52,170.62 (R. 1237).

Institution of Suit

On June 10, 1962, Messrs. Moore and Mosher came to Chicago to discuss Mosher's unpaid invoices with Union's executive vice president, Van Gorkom. Moore and Mosher took the position that Union's Graver Division had orally guaranteed their payment (R.T. 867). No claim was made that Graver was liable as a principal for payment for the fabrication work (R.T. 396-7, 868). After reviewing Graver's records and conferring with members in his organization Van Gorkom advised Mosher and Moore that he could find no evidence of a guaranty, either oral or written, beyond the first shipment covered by Page's November 15 telegram (R.T. 869, 870, 872). Six months later, on January 23,

⁷ During the course of the bankruptcy proceedings IMI also sued Union to recover \$300,000 as money due and owing the debtor under the terms of the February 5 agreement. IMI's claim included \$55,253 for fabricated material on levels 2 and 3 which was delivered by Mosher to the Debtor after February 2 and subsequently released to Graver as Manager for the Joint Venture (U.Ex. PPP).

1963 Mosher instituted this action against Ward, Union, and Fluor and its sureties (R. 1680).

Plaintiff's amended complaint (R. 268-80) against Union alleged four alternative theories of recovery: (1) that Union had requested Mosher to perform the subject work for the joint venture and had agreed to pay for the same on completion thereof (Counts II and IV, R. 271, 275); (2) that Union had orally promised to guarantee the account of IMI-Ward with the intention of not honoring its promise in order to induce Mosher to accept purchase orders from the joint venture Count V, R. 275); (3) that Union and IMI-Ward had entered into a third party beneficiary agreement for the benefit of Mosher whereby Union agreed to pay Mosher and IMI-Ward agreed that such payment would be deducted from funds coming due to the joint venture (Count VI, R. 277); and (4) that under the February 5 agreement approved by the bankruptcy court Union undertook to pay Mosher for fabricated steel deliveries made after IMI's institution of bankruptcy proceedings on February 2, 1962 (Count VII, R. 278).

Union's answer to the amended complaint denied that any of the alleged agreements or promises had been made or given and denied that the February 5 agreement approved by the bankruptcy court conferred any right upon the plaintiff (R. 1095). As further defenses Union pleaded (1) that any alleged guaranty contract was invalid by reason of the statute of frauds (R. 1099); (2) that any alleged third party beneficiary contract was rendered unenforceable because of the joint venture's default and for want of funds due the joint venture out of which to pay plaintiff (R. 1101-2); and (3) that plaintiff was estopped to assert a claim against Union by reason of having elected in the bankruptcy court to treat the indebtedness in question as the primary and indi-

vidual responsibility of IMI (R. 1098-9).

Union also filed a counterclaim against plaintiff which prayed that the court determine whether a principal-surety relationship existed between Ward and Union with respect to the Mosher claim, and in the event such relationship was found to exist and Union and Ward were each held liable to Mosher, that plaintiff be compelled first to seek satisfaction of its claim from Ward as the defendant primarily responsible for payment (R. 295).

Findings and Conclusions of the Court Below

On May 24, 1966 the court below entered findings of fact and conclusions of law holding all defendants liable to Mosher (R. 1220-40). With respect to Ward the court held that the defendant "as a member of the IMI-Ward, is obligated to Mosher by reason of Mosher's performance of the terms and provisions on Mosher's part contained" in the November 3 purchase orders (R. 1238). It further held that there was due Mosher \$298,336.58 for fabrication work on the Davis-Monthan job and \$22,716.96 for fabrication work on the Vandenberg job. Crediting \$52,170.62 for the IMI bankruptcy distribution to Mosher, the court directed the entry of judgment against Ward in the amount of \$268,882.92 (R. 1241).

With respect to Union the court rejected plaintiff's proposed findings that the October 16 letter signed by IMI's Division Manager Wilson constituted a contract between Union and Mosher, and further rejected plaintiff's proposed findings and conclusions that Union either had authorized Wilson to execute such a writing or had ratified his action (R. 1406). The court also refrained from holding that the February 5 agreement approved by the bankruptcy court conferred on Mosher any right or claim against Union.

However, the court did conclude that Page's telephone conversation with Moore on November 15, 1961 "constituted a contract and had the legal result of obligating Union to pay Mosher for all sums becoming due to Mosher" under the terms of the November 3 purchase orders issued by IMI on behalf of the joint venture (R. 1238). The court also held that the sending of a letter of final approval of the alleged November 15 oral agreement was not a "condition precedent" to consummation of a contract but that if it were, Union was "estopped to raise the non-performance of the condition as a defense" (R. 1238-9). It further concluded that the alleged oral agreement of November 15 was not unenforceable by reason of the statute of frauds (R. 1239).

In connection with Union's agreement to pay Mosher directly, the court also held that Union and IMI-Ward "agreed that Union might pay Mosher for its work, after acceptance of the work by the joint venture, and deduct Mosher's invoices from the contract price between Union and IMI-Ward" (R. 1239). The existence of any indebtedness from Union to IMI-Ward against which Union might charge what it paid to Mosher under this alleged agreement was deemed by the court not to constitute "a condition precedent to its obligation to pay Mosher" (R. 1239). The court thereupon entered judgment against Union in an amount identical to that entered against Ward (R. 1241).

With respect to Fluor and its sureties, the court held that these defendants were liable to Mosher under payment bond executed in connection with the Davis-Monahan job because of a "direct" contractual relationship which the court found to exist between Union and Mosher (R. 1237). It entered judgment against Fluor and its sureties in the sum of \$246,165.96 as the unpaid

balance for work performed at Davis-Monthan (R. 1237, 1239). The judgment did not cover the Vandenberg work because Matich-Sundt was the prime contractor on that job (R. 1241, Jt.Ex. 4).

Finally, the court concluded that Mosher was not barred or estopped from recovery from any of the defendants "by reason of its prosecution of its claim in the proceedings in the matter of the bankruptcy of IMI and its acceptance of the stock issued to it on its claim" (R. 1237).

"On June 20, 1966 the court entered a second judgment denying Union's counterclaim (R. 1345). No findings or conclusions were entered with respect to the counterclaim and no reasons were assigned for the court's action.

SPECIFICATION OF ERRORS

1. The court below erred in entering Findings of Fact No. 35 and No. 39 insofar as they find as follows:

"35. On November 15, 1961, Moore telephoned Page in Chicago and Page informed him that a clearance had been obtained from Morton for Graver's paying Mosher directly and informed Moore that Graver would make payment to Mosher directly, with deduction being made from the IMI-Ward contract. Page advised Moore, also, that he would write Moore a letter to this effect (R.T. 360-362)."

"39. * * * By reason of Moore's telephone conversation with Page on November 15, 1961, and the telegram from Page of that date, Moore understood and had reason to understand that Graver would pay Mosher directly for all the work described in Jt. Exs. 9 and 10 in evidence."

The challenged findings are unsupported by any sub-

stantial evidence, are contrary to undisputed and documentary evidence, and constitute in substantial part statements of erroneous legal conclusions rather than findings of fact.

2. The court below erred in concluding that Page's telephone conversation with Moore on November 15, 1961, and his telegram to Moore of the same date, together with Mosher's resulting action on November 16, 1961, and subsequently, with relation to the November 3 purchase orders, constituted a "direct contract" and had the legal result of obligating Union to pay Mosher directly for all sums coming due to Mosher under the terms and provisions of the November 3 purchase orders with respect to the Davis-Monthan and Vandenberg jobs.

3. The court below erred in concluding that the sending to Mosher of the letter of "final approval" allegedly discussed in the telephone conversation between Moore and Page on November 15 was not a condition precedent to the creation of a contract between the parties and that such alleged contract was not required to be in writing under the Statute of Frauds.

4. The court below erred in concluding that if the aforementioned letter was a condition precedent to Union's alleged agreement or obligation to pay Mosher then Union was estopped to raise the non-performance of the condition as a defense.

5. The court below erred in concluding that Union and IMI-Ward agreed that Union might pay Mosher for its work after acceptance of the work by IMI-Ward and deduct Mosher's invoices from the contract price between Union and IMI-Ward and that neither IMI-Ward's performance of the contract work nor the existence of an indebtedness from Union to IMI-Ward against which Union might charge payments was a

condition precedent to the alleged obligation to pay Mosher.

6. The court below erred in concluding that Mosher was not barred or estopped from recovering from Union by reason of the prosecution of its bankruptcy claim against IMI and the acceptance of the stock issued on said claim to Mosher as a general creditor of IMI.

7. The court below erred in denying Union's counterclaim and in refusing to grant the relief prayed for thereunder, and in failing to enter findings of fact and conclusions of law supporting its judgment denying the counterclaim.

ARGUMENT

POINT I.

THE COURT ERRED IN HOLDING THAT THE NOVEMBER 15 TELEPHONE CONVERSATION RESULTED IN AN ORAL CONTRACT OBLI- GATING UNION TO PAY MOSHER FOR WORK PERFORMED FOR THE JOINT VENTURE

(Specifications of Error Nos. 1, 2, 3 and 4)

SUMMARY OF ARGUMENT

The court erred in holding that the November 15 Page-Moore telephone conversation resulted in an oral contract whereby Union became obligated to pay Mosher for all work performed for IMI-Ward at both Davis-Monthan and Vandenberg. Page's oral promise, which he confirmed by telegram, was limited to a guaranty of the first \$7,600 material shipment for Davis-Monthan. Moore conceded that the joint venture's separate Vandenberg order was not even discussed during the November 15 telephone conversation. The District Court's contrary findings based on Moore's testimony were

clearly erroneous. Moore's testimony as a matter of law established no enforceable oral contract. He testified that Page promised "to write me a letter in a day or two giving final approval on this agreement." He testified further that by "this agreement" he meant Page's alleged promise that Union would pay for the Davis-Monthan work "if the joint venture didn't pay." This testimony proved no contract because "final approval" was never given. Moreover, any such oral guaranty would be unenforcible under the statute of frauds as a promise to answer for the debt, default or miscarriage of another person. Nor was Union estopped from contending that a "final approval" letter constituted a condition precedent to the creation of an enforceable guaranty. Estoppel is inapplicable to an oral agreement barred by the statute of frauds or an oral promise to reduce a guaranty to writing.

The \$268,882 judgment entered against Union by the court below rests on the court's holding that the November 15, 1961 Page-Moore telephone conversation gave rise to an oral contract whereby Union unconditionally agreed to pay Mosher for all steel furnished, fabricated and delivered to Davis-Monthan and Vandenberg pursuant to IMI-Ward's November 3 purchase orders.⁸ In arriving at this decision the court below necessarily had first to establish as a matter of fact what was said by Page and Moore during their telephone

⁸ This holding was stated in the form of a fact finding in Findings 35 and 39 (see Specification of Error No 1, *supra*, p. 24), and was reiterated as a legal conclusion in Conclusion 6, as follows: "Page's telephone conversation with Moore on November 15, 1961, and his telegram to Moore of the same date, together with Moore's resulting action on November 16, 1961, and, subsequently, with relation to Jt. Exs. 9 and 10 in evidence [joint venture November 3 purchase orders], constituted a contract and had the legal result of obligating Union to pay Mosher directly for all sums becoming due to Mosher under the terms and provisions of Jt. Exs. 9 and 10 for furnishing, fabricating and delivering steel to the Tucson and Vandenberg jobs" (R. 1238).

conversation on November 15 and, upon establishing that fact, had then to determine as a matter of law what obligation, if any, was thereby created. We submit that the court below erred both in performing its fact finding function and in applying the law applicable to this case.

A. THE COURT'S FINDING OF FACT WITH RESPECT TO THE NOVEMBER 15 TELEPHONE CONVERSATION IS CLEARLY ERRONEOUS.

The testimony given by Page and Moore concerning the crucial November 15 telephone conversation in reality conflicted in only one substantial respect. Page testified that while Moore was requesting a guaranty of payment on all work covered by the joint venture's Tucson purchase order, he only committed Graver to an immediate guaranty of the scheduled November 16 shipment which Harle was seeking to have released from Mosher's shop (R.T. 742). As to the balance of the order, Page informed Moore that the matter would have to be considered by his superiors and that he would report to Moore by letter (R. 745, 747, 749). Moore, on the other hand, denied that the promised guaranty had been limited to the first shipment confirmed by Page's telegram and with respect to which Graver's expediter Harle was seeking a release. He asserted that Page had promised to send a letter giving final approval to a guaranty covering payment of all Davis-Monthan fabrication work included in the November 3 purchase order (R.T. 415-6).

In evaluating this conflicting testimony, it must be remembered that Page left Graver in December, 1961 and had not been in its employ for three years prior to the time of trial (R. 1234). He had no position or relationship with Graver to protect when testifying in this

case. Moore, however, continued as Mosher's treasurer and general credit manager at the time of trial (R.T. 350). His employer's claim for relief against Union obviously depended upon his testimony and the words he was prepared to attribute to Page during that brief telephone conversation three years before the trial.

The court below nevertheless disregarded Page's testimony and credited Moore's version of the scope of the proposal although Moore was the one witness who more than any other might be expected to offer a biased and partisan recollection. Moreover, the trial court accepted Moore's version of the telephone conversation in the face of contemporaneous documentary proof and other undisputed evidence consistent only with the testimony given by Page.

Branting's November 2 memorandum confirmed that Page had told John of IMI-Ward two weeks before his conversation with Moore that, "He, Page, did not have authority to guarantee payment of the venture's Tucson order" and that a guaranty "would be considered only upon the written request" of the joint venture (U.Ex. K). Therefore Page's testimony that he told Moore on November 15 that he would have to discuss any guaranty beyond the first shipment with his "higher-ups" was fully corroborated by the previously expressed and recorded view of his authority. It is undisputed, moreover, that the written request which Page considered a condition precedent to "consideration" of a guaranty was not received by Page at the time of the November 15 conversation and in fact was not received until December 11, when Page was no longer a Graver employee (R. 1231). Yet the court below concluded that Page on his own authority voluntarily agreed to extend a guaranty of the entire order without this written request in hand. Again, when the joint venture's authorization

was received in December, it was by its terms limited to work involving a dollar amount of "approximately \$225,000" (Jt.Ex. 26). The court below nevertheless concluded that Page was willing orally to make an open-end commitment on behalf of his company to be responsible for payment of everything Mosher shipped to the joint venture — an amount eventually exceeding \$320,000, or nearly \$100,000 more than the sum covered in the joint venture's belated authorization letter.

Even more important than these facts is the language of Page's November 15 telegram to Moore which exactly confirmed Page's version of the telephone conversation. It states, "Please accept this telegram as guaranty of Idaho-Maryland's payment to you on your November 16 shipment. Complete details will follow in a letter early next week" (Jt.Ex. 22). Page obviously was prepared to guarantee a \$7,600 initial shipment in summary fashion on his own authority. A guaranty of several hundred thousand dollars, however, was a problem of substantially different magnitude which required discussion with his superiors and a further report to Moore by letter. Significantly, *Moore never requested the letter of guaranty allegedly promised by Page and never disputed that Page's telegram stated the substance of their conversation until after the joint venture's default in payment.*

The fact that no guaranty beyond the initial shipment was extended on November 15 was further corroborated by a draft of a proposed extension of that guaranty prepared after the joint venture's request was received by Graver on December 12. That draft, prepared by Page's successor, Trytten, referred to the wire guaranteeing the November 16 shipment and declared (Jt.Ex. 21):

"We are now prepared to *enlarge* this guaranty

sufficiently to cover all payments which may become due to you by IMI-Ward . . .”

This draft letter of guaranty, although never signed or sent, reflected the contemporaneous understanding of Graver's officers that the existing commitment was limited to the first shipment and that enlargement of the guaranty remained an open question. Inasmuch as it was prepared for private circulation and consideration by Graver's officers, the letter had “the highest validity as evidence of intention,” *United States v. General Electric Co.*, 82 F. Supp. 753, 844 (D.C. N.J., 1949). Had a guaranty been extended on November 15 as testified to by Moore, the draft letter obviously would have been drawn in terms of *confirmation* of an existing guaranty rather than an *enlargement* to cover all payments.

Finally, the conclusion of the court below with respect to the alleged financial commitment made on November 15, extended that commitment not only to material shipments for Davis-Monthan but also to the separate shipments for Vandenberg covered by a separate joint venture purchase order. No testimony or evidence was ever introduced during the trial of the case below which in any way indicated that the Vandenberg work was ever discussed between Page and Moore on November 15 or any other date. With respect to the conversation with Page, Moore actually testified that no mention was made of the Vandenberg job. He was questioned as follows (R.T. 422):

“Q. You hadn't told Mr. Page, had you, that these two IMI or this Holmes and Orr that they had come and your company had agreed to furnish another \$22,000 worth, you hadn't told him that, had you?”

“A. No, I didn't tell him that.”

“Q. Nobody else in your company did because you were the only one that talked to him, isn’t that right?”

“A. That is right.”

Yet the court below simply proceeded to lump this additional \$22,700 of liability under the alleged agreement of November 15 without any basis in the record.

The Supreme Court has declared that despite the advantage which the trial judge enjoys in evaluating testimony, findings of fact nevertheless must be set aside under Rule 52(a) when “although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). In *Gypsum*, as in the present case, the trial court had chosen to believe oral testimony which could not be reconciled with the documentary evidence. The Supreme Court set aside the findings and declared, “Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the creditability of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly enrroneous” (333 U.S. at p. 396).

See also *Orvis v. Higgins*, 180 F.2d 537, 539 (C.A.2, 1950), where the Second Circuit held that when “the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge’s finding and substitute our own (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful” Compare *United States v. Fay*, 353 F.2d 56, 59 (C.A. 2,

1965); *Fritz v. Jarecki*, 189 F.2d 445, 448 (C.A.7, 1951).

In the present case the district court's action in predicating findings on an uncritical acceptance of Moore's self-serving testimony, wholly inconsistent as it was with both documentary and other undisputed evidence, compels the conclusion that "a mistake has been committed" which this Court should correct. And, of course, where *no evidence* of any kind exists to support a finding, as here in connection with the Vandenberg work, then such finding of necessity must be set aside. *Ecko Products Co. v. Chicago Metallic Mfg. Co.*, 321 F.2d 550, 552 (C.A.7, 1963), cert. den. 375 U.S. 970.

B. MOORE'S TESTIMONY AS A MATTER OF LAW FAILS TO SUPPORT THE CONCLUSION THAT THE NOVEMBER 15 CONVERSATION RESULTED IN AN ENFORCEABLE ORAL CONTRACT.

Even if this Court should determine that the court below was empowered to enter a finding based on Moore's version of the November 15 conversation, we submit that the trial court failed to reach a proper conclusion as to the legal effect of that conversation. In other words, treating the statements attributed to Page by Moore as true and an undisputed fact, the court below was obliged to determine correctly whether those statements gave rise to a legally enforceable obligation. This determination involves the straightforward question of law with respect to which this Court has unfettered power of review.

See *Cordovan Associates, Inc. v. Dayton Rubber Company*, 290 F.2d 858 (C.A.6, 1961), where Judge Weick declared at p. 859-860:

"When it comes to conclusions of law and inferences to be drawn therefrom, the appellate court is free to act independently and draw its own legal conclusions and inferences. *United States v. Mis-*

Mississippi Valley Generating Company, 364 U.S. 520, 526, 81 S. Ct. 294, 5 L. Ed. 2d 268. If this were not so, the appellate court would be stripped of its power of review. Moreover, not all findings labeled as findings of fact are binding on an appellate court. Where a finding designated as a finding of fact is not in reality a finding of fact, but is a conclusion of law or a mixed finding of fact and conclusion of law, it is not binding on the appellate court. *Bogardus v. Commissioner*, 302 U.S. 34, 58 S. Ct. 61, 82 L. Ed 32; *Weible v. United States*, 9 Cir., 1957, 244 F.2d 158; *Chandler v. United States*, 7 Cir., 1955, 226 F.2d 403. Where a finding is of an ultimate fact in the making of which is involved the application of legal principles, it is subject to review. *Baumgartner v. United States*, 322 U.S. 665, 64 S. Ct. 1240, 88 L. Ed. 1525.”

In *Plomb Tool Co. v. Sanger*, 193 F.2d 260 (C.A. 9, 1951), this Court held that in determining whether an agreement gave rise to an independent contractor status, it was not bound by the determination of the court below in its findings of fact and conclusions of law. The agreement being undisputed, the legal consequences flowing from that document were within the province of this Court to determine. It stated, at p. 264:

“Nor is Rule 52(a), Federal Rules Civil Procedure, 28 U.S.C.A., applicable to appellant’s contention that Sanger was an independent contractor, for it is not the findings of the district court that appellant assails, but rather its *conclusion* drawn therefrom. We have long recognized the advantages enjoyed by the trial judge in evaluating testimony and arriving at the facts flowing from that court’s opportunity to observe the witnesses, but here the facts are not in dispute. It is rather the conclusion of the district court with which we have parted company.”

Similarly, in *Stevenot v. Norberg*, 210 F.2d 615 (C.A.9, 1954), this Court stated, at p. 619:

“When a finding is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings should not be set aside, unless clearly erroneous, but is free to draw its own conclusions.”

Compare *Phoenix Title & Trust Co. v. Stewart*, 337 F.2d 978, 985 (C.A.9, 1964); *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.*, 178 F.2d 541, 548 (C.A.9, 1949).

Treating Moore's version of the crucial conversation as if it had been true and undisputed, it is nevertheless apparent from his testimony that what was discussed was not a "direct" contract but a guaranty or agreement to pay in the event the joint venture failed or refused to pay, which agreement was not to be deemed operative unless and until given "final approval" in writing. Thus Moore testified: "I told Mr. Page we would have to have assurance, that *if we were not paid within the terms of the sale* that they would be responsible for paying Mosher Steel Company" (R.T. 335). He admitted the understanding was that Graver would be obligated only "*if we were not paid on time by the joint venture*" (R.T. 456). In summing up his testimony, he acknowledged that the "correct" understanding of the arrangement was "*if the joint venture didn't pay*, that they [Graver] would be in a position to pay [Mosher] direct . . ." (U.Ex. UUU, p. 35). Time and again during the trial Moore referred to Page's alleged promise as a guaranty, stating, for example, "I understood all the time it was supposed to be a guaranty of the entire account," and "I expected the entire amount to be guaranteed" (R.T. 415, 416). Moore was no unsophisticated businessman. He was Mosher's treasurer and general credit manager. When he said "guaranty," he knew what he was talking about.

Moreover, Moore expressly conceded that the guaranty supposedly promised by Page was not a final and binding commitment at the time of the November 15 telephone conversation, but was to be made final and binding only through subsequent letter "outlining this agreement" (R.T. 362). In this regard, Moore testified (R.T. 361), "He [Page] said that he would write me a letter in a day or two giving *final approval* on this agreement." Therefore, even according to Moore, a letter of "final approval" was a condition precedent to the creation of a contract of guaranty. It is also a prerequisite under the statute of frauds.

(1) No Contract Resulted For Want of "Final Approval"

It is fundamental contract law that an enforceable bargain is not made so long as parties concerned contemplate that something remains to be done before establishing a contractual relationship between them. Preliminary negotiations may establish the salient terms of an agreement. But where execution of a writing is intended to be a condition to final agreement, such negotiations cannot be construed as a contract.

With respect to such legally inoperative preliminary negotiations it is stated in 1 *Corbin On Contracts* (1950 Ed.), § 30, at pp. 97 and 98:

"One of the most common illustrations of preliminary negotiation that is totally inoperative is one where the parties consider the details of a proposed agreement, perhaps settling them one by one, with the understanding during this process that the agreement is to be embodied in a formal written document and that neither party is to be bound until he executes this document. . . ."

* * *

"The courts are quite agreed upon general principles. The parties have power to contract as they please. They can bind themselves orally or by informal letters or telegrams if they like. On

the other hand, they can maintain complete immunity from all obligation, even though they have expressed agreement orally or informally upon every detail of a complex transaction. The matter is merely one of expressed intention.”

In the present case the evidence clearly discloses an “expressed intention” that the guaranty discussed orally on November 15 was not to become an enforceable contract until approved in writing. Moore expressly admitted that “final approval on this agreement” was to be given in an anticipated letter from Page. In fact, Moore’s testimony in this regard corroborated rather than conflicted with that of Page, who declared that a guaranty beyond the first shipment had first to be discussed with his “higher-ups” at Union and that “complete details” would be sent “in a letter early next week.” Therefore, under either version it is undisputed that the conversation involved no more than an expression of intention to extend a guaranty in writing at a future date. This created no present oral contract between the parties.

In *Merritt-Chapman & Scott Corp. v. Gunderson Bros. Eng. Corp.*, 305 F.2d 659 (C.A.9, 1962), this Court considered an almost identical question. There the district court had permitted the jury to determine whether a conversation, concerning a “promised” purchase order, of itself created an enforceable contract between the parties where the purchase order was never sent. In holding that judgment notwithstanding the verdict should have been granted for the defendant, this Court stated, at page 664:

“Gunderson further contends that certain conversations relating to a ‘promised’ purchase order and letter of intent constituted acceptance of its bid. No such documents were ever forthcoming. A promise to contract, or a promise to place an

order in the future, is certainly nothing more than negotiation. * * * Of the proposed purchase order and letter of intent, we can say that conversations in reference thereto indicated, at best, nothing more than an intention on the part of MCS to contract with Gunderson at some future date."

In the *Merritt-Chapman* case evidence was also presented that the plaintiff "understood" from his conversation with the defendant that the plaintiff had been granted the purchase order under consideration. Similarly in the present case the district court found that Moore "understood" from the November 15 conversation and ensuing telegram that Union would be responsible for assuring payment (R. 1232). However, this Court declared that a conversation gains no greater legal import by reason of what one of the parties "understood" as to its significance. On this issue, this Court stated, at pp. 663-664:

"Also, what Gunderson 'understood' from the conversation can have no greater legal insignificance than that which is revealed by the actual transactions between the parties. The conversation of March 26, 1956, must be viewed in its entirety and the only inference possible is that the parties were still bargaining."

* * *

"MCS certainly manifested an intention to enter into a contract with Gunderson at some time in the future, and MCS may very well have taken advantage of Gunderson, but contract with Gunderson it did not."

The principles which this Court applied in *Merritt-Chapman* were also followed in *Watson v. Lehigh Valley Wood Work Corp.*, 198 F. Supp. 273 (E.D. Pa., 1961). In that remarkably similar action the defendant, during a telephone conversation with the plaintiff, allegedly promised to forward a letter of guaranty cover-

ing future credit sales of lumber to a milling company. No such letter was mailed, but subsequently a telegram was sent by defendant guaranteeing certain particular invoices totaling \$16,000. During the period involved, however, the plaintiff shipped the milling company 19 cars of lumber for a total price of \$68,500. On failing to receive payment plaintiff sued on the alleged guaranty.

In considering the effect of the telephone conversation, the court found as a matter of fact that defendant had orally promised to forward a guaranty letter on the account. However, it concluded that the promise was not to take effect until the letter was sent and that the telephone conversation could not of itself be considered a contract. The Court stated, at page 276:

“Where an intention is manifested in any way, that legal obligations between parties shall be deferred until a writing is executed, preliminary negotiations and agreements do not constitute a contract. [Citations.] Therefore, Schmerling’s preliminary agreement to mail a letter of guaranty did not create a binding obligation. . . . It should also be noted that § 185 of the *Restatement of Contracts* provides that a promise to sign a written contract of guaranty must be in writing to satisfy the Statute of Frauds.”

The court held for the defendant commenting that when a plaintiff: “seeks to make one liable for the debt of another, the case must be clearly proved and every ambiguity in the evidence weighed in favor of the defendant” (p. 277).

See also *Neff v. World Publishing Company*, 349 F.2d 235, 248 (C.A.8, 1965); *A. E. Staley Mfg. Co. v. Northern Cooperatives*, 168 F.2d 892, 895 (C.A.8, 1948).

The state substantive law applied in *Merritt-Chapman* and *Watson* is no different than the law of Illinois

applicable in this case.⁹ For its most recent expression see *Calo, Inc. v. AMF Pinspotters, Inc.*, 31 Ill. App. 2d 2, 8-9, 176 N.E. 2d 1, 5 (1961) ("Where the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until this is done. *Hausman Steel Co. v. N. P. Severin Co.*, 316 Ill. App. 585, 589, 45 N.E. 2d 552, 554; *Baltimore & Ohio Southwestern R. Co. v. People ex rel Allen*, 195 Ill. 423, 427, 63 N.E. 262, 263.")

These authorities illustrate the error committed by the court below in creating an enforceable obligation out of a conversation which contemplated but did not give rise to a contract. Even according to Mosher's own witness, "final approval" of the alleged guaranty was never given, and the "details" of the proposed contract of guaranty were never established by letter as contemplated by the parties. The court below simply supplied these "details" without benefit of evidence, as in the case of the Vandenberg work with respect to which even Moore admitted no discussion ever occurred. The trial court similarly supplied "details" of a non-existent November 15 bargain when it found that Union had promised to pay for \$320,000 of work where the joint venture letter

⁹ See *Watson v. Lehigh Valley Wood Work Corp.*, 198 F. Supp. 273 (E.D., Pa., 1961), where the question of applicable law arose under facts identical with this case, the court holding at p. 275: "It is well settled that the validity of a contract is determined by the law of the state in which it is executed. [Citations.] Watson alleges that Schmerling agreed to guarantee payment by Lehigh in a telephone conversation originating with Watson in Nevada and placed with Schmerling in Pennsylvania. Where an acceptance is to be given by telephone, the place of contracting is where the acceptor, or, in this instance, the alleged acceptor [Schmerling], speaks his acceptance. *Restatement, Conflict of Laws*, § 326 Comment (c)." See also 1 *Corbin on Contracts* (1950 Ed.), § 79, where it is stated: "The question before the courts has been as to the place at which the contract should be regarded as having been made. This has been held to be the place at which the offeree speaks the words of acceptance into the telephone transmitter."

of guaranty authorization received on December 12 authorized a deduction of \$225,000 in the event a guaranty were given and had to be honored at some future date.

In *Joseph v. Donover Corp.*, 261 F.2d 812 (C.A.9, 1958), it was emphasized that courts do not create but only enforce contracts made by private parties. This Court adopted as its own, the statement that (p. 820):

“To create a contract, then, the minds of the parties must meet as to every essential term of the proposed contract, and there must be a clear and unequivocal acceptance of a certain and definite offer in order that a mere agreement may become a contract. Therefore, it is necessary, among other things, that the minds of the parties meet as to the essential terms of the proposed contract.”

In the present case the court below lost sight of this sound principle in creating an agreement where there was no meeting of the minds but only a discussion of a proposed contract never made final in the manner contemplated by the parties.

(2) The Alleged Guaranty Was Required To Be In Writing Under the Statute of Frauds

Final written approval of the proposed guaranty was not only contemplated by the parties as a condition precedent to the creation of a contract, but was affirmatively required under the statute of frauds — a defense raised in Union’s answer and erroneously rejected by the court below (R. 1099). This once again involves a question of Illinois law because the authorities established that the statute of frauds of the place of contracting applies, at least where the statute is considered sub-

stantive in nature.¹⁰

Like the statute of frauds in most jurisdictions, the Illinois statute, *Illinois Revised Statutes* (1965), Ch. 59, § 1, provides that:

“No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, . . . unless the promise or agreement upon which such action shall be brought, or some memorandum or not thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”

In determining whether an agreement constitutes “a promise to answer for the debt, default or miscarriage of another person” within the meaning of the statute, the test generally recognized is whether the promisor by his promise is in effect a surety and is therefore secondarily liable, or whether he has accepted primary responsibility for the payment of goods or services rendered or to be performed for another.

Under this test if the oral promise creates a relationship of surety and principal between the promisor and the original debtor it is held to be within the statute and therefore unenforceable. However, an oral promise creating primary responsibility in the promisor to the creditor is not within the statute and is, therefore, enforceable if such a promise can be proved. Professor Williston states that, “The test which it is submitted is the accurate one . . . is whether a promisor is, to the

¹⁰ See *Smith v. Onyx Oil & Chemical Co.*, 218 F.2d 104 (C.A.3, 1955); *Continental Collieries v. Shober*, 130 F.2d 631 (C.A. 3, 1942); *Schoettle v. Sarkes Tarzian, Inc.*, 191 F. Supp. 768 (E.D., Pa., 1961); *Restatement, Conflict of Laws* § 334, Comment (b). The Illinois statute of frauds has been construed as substantive in *Miller v. Wilson*, 146 Ill. 523, 529, 34 N.E. 1111, 1113 (1893) and *Murdock v. Calgary Colonization Co.*, 193 Ill. App. 295, 298-9 (1915).

actual or presumed knowledge of the creditor, a surety; if so, his promise is within the Statute.” 3 *Williston, Contracts* (3d Ed., 1960) § 462, at p. 395. Professor Corbin agrees with this test. He states, “Wherever the relation between the two obligors is that of principal and surety and this fact is known to the creditor, the case is within the statute. Supposed distinctions between a ‘surety’ and a ‘guarantor’ are not material in this connection.” 2 *Corbin on Contracts* (1950 Ed.), § 358, at p. 247.

The Illinois courts have regularly applied the test approved by Professors Williston and Corbin. *Resseter v. Waterman*, 151 Ill. 169, 176-7, 37 N.E. 875, 877 (1894); *Illinois Surety Co. v. Munro*, 209 Ill. App. 407, 414-5 (1918).¹¹ Moreover, in construction and supply contract cases a promise to pay a materialman or supplier of a subcontractor, if the subcontractor fails to pay, has been held to constitute a secondary or collateral undertaking subject to the statute of frauds. *Bonner & Marshall Co. v. Hansell*, 189 Ill. App. 474 (1914); *Jenkins v. Lundgren*, 85 Ill. App. 494 (1899); *Heggie v. Smith*, 87 Ill. App. 141 (1899).

The *Heggie* decision is illustrative of these cases. There, a general contractor responsible for improving a canal had subcontracted to the Geraldine Company the work of removing debris from the channel. Geraldine required certain equipment to perform this work which the plaintiff refused to supply because of uncertainty regarding Geraldine’s credit. The managing partner of the general contractor then visited the plaintiff’s offices and promised that if the equipment would be furnished the contractor would see that the plaintiff was paid “if Geraldine did not pay.” The

¹¹ Illinois Appellate decisions do not appear in the North Eastern Reporter prior to 1936.

court held the promise to be collateral and within the statute of frauds, stating, at p. 143:

“The promise, as testified to by appellant, was, that if Geraldine did not pay for the skips, appellees would pay for them. The language standing alone imports simply a collateral undertaking; but further than this, the skips were charged to Geraldine upon the books of appellants; the bills were made out to him, and payment thereof was frequently demanded from him. There was, therefore, a binding and subsisting obligation on the part of Geraldine to appellants, to which the promise of appellees, if made, was collateral. In other words, the party for whom the promise was made, was liable to the party to whom it was made. (*Resseter v. Waterman*, 151 Ill. 169-176, and cases cited.)”

“This seems to be one of the tests in determining whether the undertaking is original or collateral only. Under the authorities we are clearly of the opinion the promise, if made as claimed, was collateral to the original obligation of Geraldine, and was not binding or enforceable unless made in writing.”

In *Heggie* the court emphasized that plaintiff in naming on his books of accounts the subcontractor as his customer and invoicing that customer and making demands for payment upon him, clearly indicated his understanding that the subcontractor was primarily liable. The importance of examining contemporaneous business records to determine the nature of the understanding has been noted in a number of Illinois decisions. See *Lusk v. Throop*, 189 Ill. 127, 133, 59 N.E. 529 (1901), where the Illinois Supreme Court declared, at p. 532:

“If plaintiff’s books show that the defendant was not originally debited there, but that the goods were charged against the person receiving them,

this fact, if unexplained by other circumstances, would be strong evidence going to show that credit was given to the person receiving the goods. . . .”

The same point was made in *Bonner & Marshall Co. v. Hansell*, 189 Ill. App. 474 (1914), the court there declaring, at p. 482-3:

“Where the price of goods sold and delivered is charged upon the seller’s books to the person to whom they are delivered, that fact, if unexplained by other circumstances, is generally considered as strong evidence going to show that credit was given to such person. . . .

“In this case, it was admitted that appellee did not enter upon its books of account any charge against appellant for the price of the brick that were delivered. It charged the price of the brick directly to Cox Brothers. . . . this evidence, unexplained, tends strongly to prove that at the time of the delivery of the brick, appellee did not consider appellant as primarily its debtor, but intended to collect its claim from Cox Brothers if it could, and regarded the promise of Pray as a guaranty only. * * * This being so, it must be held that the promise of Pray, on behalf of appellant, ‘to see that the account was paid’ or ‘to guarantee the account’ was a collateral undertaking to answer for the debt or default of Cox Brothers.”

In the present case, following receipt of IMI’s purchase order, IMI was described on Mosher’s shop records and ledger as its customer for whom the work was being performed and all invoices covering that work were sent to IMI, rather than Graver (Jt.Ex. 13 and 14), (M.Ex. 22-A). But beyond all this it will be remembered that prior to receipt of the IMI-Ward purchase orders, Graver had been shown on Mosher’s books and records as the customer for the Davis-Monthan work (Jt.Ex. 12). *Thus, Mosher affirmatively*

acted to change its records to name IMI rather than Graver as the customer in question.

Although Graver's obligation was clearly collateral, the court below found that "Graver acted primarily to protect and advance its own interests under its sub-contracts with Fluor and Matich Bros. and Sundt because it had a definite stake in seeing to it that the fabricated steel came to the Tucson and Vandenberg site." (R. 1233). Assuming that to be true, the same observation could be made with equal force in any case involving multiple contractor relationships. However, this circumstance does not remove a contractor's alleged oral guaranty from the statute of frauds.

The Fifth Circuit ruled on this point in *Brown & Root, Inc. v. Gifford-Hill & Company*, 319 F.2d 65, 69 (C.A.5, 1963), stating:

"In the instant case, the facts as set out above show that the promise of Brown & Root to pay Gifford-Hill, at best, was no more than a promise to pay if Lake Pearl did not."

"The agreement of Brown and Root having been one of guaranty only, the nature and effect of such agreement is not altered because Brown & Root was interested in the resumption of the deliveries of gravel."

"If the statute of frauds is held to apply only where a promisor guarantees the debt of another in a transaction in which the promisor is completely uninterested, the statute is effectively destroyed. Completely uninterested persons do not guarantee the debts of others."

* * *

"It follows that appellee may not recover under terms of the oral contract. The judgment of the trial court in appellee's favor is reversed and judgment is here rendered in favor of appellant." (Emphasis Supplied)

The court below similarly emphasized Harle's contacts with Mosher's various officers, (R. 1227-8, 1230-2) but Mosher never contended that Harle's concern as expediter over traffic and delivery problems implied any financial undertaking on Graver's part. The complicated business of multi-million dollar missile site construction necessarily resulted in numberless meetings and negotiations between contractors, subcontractors, suppliers, and materialmen having no direct contractual relationship. In *Fidelity & Deposit Company of Maryland v. Harris*, 360 F.2d 402 (C.A.9, 1966), this Court so observed in similar context, at p. 410:

"Also, the fact that Dixon's Project Manager had dealings with Paramount's foreman and with Yost throughout their performance of their work does not justify an inference that Dixon had contracted directly with Yost or Paramount. If this inference were permissible, every subcontractor or material supplier who received instructions, information or guidance from the prime contractor would be held to have a direct contractual relationship with the prime contractor. There is an obvious distinction between dealings relating to the performance of his work with a person whose relationship to the prime contractor is too remote for Miller Act coverage, and conversations or conduct from which an inference of a promise to pay would be warranted."

These authorities, we submit, conclusively establish the error of the court below in concluding that the statute of frauds constituted no defense to the oral guaranty claim founded on Moore's testimony. Union's obligation under the putative agreement was contingent upon IMI-Ward's failure to honor its primary obligation to pay for the work it ordered done and, as such, was within the statute of frauds.

(3) Graver Was Not Estopped From Asserting That a Letter of "Final Approval" Was a Condition Precedent to Creation of An Enforceable Guaranty Contract

Plaintiff recognized the statute of frauds problem confronting it in suing on an oral guaranty. In consequence Mosher alleged in count V of its amended complaint that Page falsely represented that Union would guarantee payments for shipments made to the joint venture with the intention of not honoring that promise (R. 275). The trial court made no finding on this particular issue but did state in Finding 44 that other officials of Graver "knew, also, that Mosher was going ahead on the work described in [IMI-Ward's purchase orders] in reliance upon its understanding from Page's assurance on the telephone and his telegram that Graver would pay . . . " (R. 1234-5). The court also concluded that if the sending of the letter mentioned in Page's telegram was a condition precedent to Union's agreement or obligation to pay Mosher, then "Union is estopped to raise the non-performance of the condition as a defense in view of the facts set out in Finding of Fact No. 44 . . ." (R. 1238-9).

Union's officers, of course, were aware that Mosher was proceeding with the joint venture purchase order work, but no evidence exists for concluding that these officers "knew" the work was being performed in reliance upon an alleged promise of oral guaranty. What they "knew," as even Moore concedes, was that final approval of a guaranty remained a matter for their decision. Mosher's willingness to proceed with the joint venture work without final approval and without any further inquiry or expression of interest in a guaranty after November 15 caused these officers to conclude that a guaranty was no longer being required (Jt.Ex. 24).

But assuming *arguendo* that Page had unqualified-

ly promised to send a guaranty letter, which promise Union's officers "knew" was being relied upon by Mosher, this circumstance would create no equitable estoppel under Illinois law. In the case of *Lowenberg v. Booth*, 330 Ill. 548, 555-6, 162 N.E. 191, 195 (1928), the Illinois Supreme Court held that all six elements of actual fraud must appear in order to invoke the doctrine of equitable estoppel:

"(1) Words or conduct by the party against whom the estoppel is alleged amounting to a misrepresentation or concealment of material facts; (2) the party against whom the estoppel is alleged must have knowledge, either actual or implied, at the time the representations were made, that they were untrue; (3) the truth respecting the representations so made must be unknown to the party claiming the benefit of the estoppel at the time they were made and at the time they were acted on by him; (4) the party estopped must intend or expect that his conduct or representations will be acted on by the party asserting the estoppel or by the public generally; (5) the representations or conduct must have been relied and acted on by the party claiming the benefit of the estoppel; and (6) the party claiming the benefit of the estoppel must have so acted, because of such representations or conduct, that he would be prejudiced if the first party is permitted to deny the truth thereof."

The *Lowenberg* rule was subsequently challenged in *Ozier v. Haines*, 411 Ill. 160, 164-5, 103 N.E. 2d 485, 487-8 (1952), where the appellate court had denied an estoppel because of the non-existence of words or conduct amounting to the misrepresentation or concealment of an existing fact. The Supreme Court refused to weaken its *Lowenberg* decision, stating:

"Plaintiffs attack the *Lowenberg* case in many different ways, but the substance of all their argument is that the rule therein set forth is too techni-

cal and too general and that its effect is to unduly restrict the application of the doctrine of estoppel.”

“. . . [I]n effect, their position is such that the promisee's reliance upon an unenforcible promise will validate the promise. To adopt such a view would render the Statute of Frauds useless and unmeaning. It is true that harsh results, or moral fraud as plaintiffs choose to term it, may occur where one has changed his position in reliance upon the oral promise of another, but it is a result which is invited and risked when the agreement is not reduced to writing in the manner prescribed by law.”

The issue was once again considered in *Sinclair v. Sullivan Chevrolet Co.*, 45 Ill. App. 2d 10, 195 N.E. 2d 250 (1964), *aff'd* 31 Ill. 2d 507, 202 N.E. 2d 516 (1964). There the Appellate Court held, at p. 255:

“It is not contended by plaintiff that there was fraud or misrepresentation of fact at the inception of the agreement, merely that defendant did not intend to keep the promises made, when made. This is not sufficient to warrant the application of the doctrine of estoppel.”

On appeal, the Illinois Supreme Court again affirmed on the basis of *Lowenberg* and *Ozier*, stating, at p. 518:

“In order to invoke the doctrine of equitable estoppel, there must appear, among other things, words or conduct by the guilty party amounting to a misrepresentation or concealment of a material fact. (*Ozier v. Haines*, 411 Ill. 160; *Lowenberg v. Booth*, 330 Ill. 548.) To be actionable, a false representation must generally relate to an existing or past event, not to a promise or prognostication concerning a future happening (*Brotsky v. Frank*, 342 Ill. 110; *Bielby v. Bielby*, 333 Ill. 478), and although fraudulent intent is not essential to the doctrine of estoppel, these same considerations have prevented its application where an individual is charged with having failed to comply with an oral agreement rendered unenforceable by statute or to honor his

verbal promise to reduce such an agreement to writing. *Ozier v. Haines*, 411 Ill. 160; 37 C.J.S., *Statute of Frauds*, §§ 243 and 247.”

“When the instant contract was entered into, there appears to have been no concealment or misrepresentation of fact but mere oral promises concerning future performances which the law did not regard as binding. We hold that the present suit was barred by statute as a matter of law and that the trial court was correct in granting summary judgment for the defendant.”

For federal decisions applying Illinois law, see *Rep-sold v. New York Life Insurance Co.*, 216 F.2d 479, 485-6 (C.A.7, 1954); *North American Plywood Corp. v Oshkosh Trunk & L. Co.*, 263 F.2d 543, 545 (C.A.7, 1959); *Gass v. National Container Corporation*, 171 F. Supp. 441, 445 (S.D., Ill., 1959).

The district court therefore unquestionably erred in concluding that Union was estopped from contending that a letter of “final approval” constituted a condition precedent to the creation of enforceable guaranty contract. The whole purpose of the statute of frauds is to prevent persons from being harassed by claimed oral promises made in the course of negotiations not ending in a contract reduced by writing. The prohibitions of the statute cannot be avoided by the device of attributing an oral promise to a defendant and then charging that it was made with the intention of not performing the same.

We recognize that courts are sometimes reluctant to invoke the statute of frauds when a harsh, technical application of the statute would result in injustice to a diligent creditor who has parted with his property or services in good faith.

That is not the situation in this case. Failure to apply the statute will result in injustice to the claimed guarantor Union, which has already paid the joint ven-

ture for the work for which it is now sued by Mosher, and would be forced to pay twice for the same work, should this judgment be affirmed and Mosher elect to collect it from Union rather than from Ward, the remaining joint venturer.

Mr. Moore's conduct, after he received the telegram guaranteeing payment for the first shipment, indicates that he may have negligently misread that telegram. This he denies, and says that he ignored not receiving the promised letter which was to give "final approval," choosing to rely on Page's oral promise. A curious thing about Mosher's case is the fact that out of the mass of correspondence and other documents, Mosher could not produce to corroborate Moore a single letter, book entry, inter-office memorandum, or even the testimony of a fellow employee, to the effect that Mosher had given a guaranty or made a direct contract with Graver.

Union would have been in a perfect position to protect itself by deductions from the joint venture contract had Mosher's conduct at the time of these transactions only been consistent with its claims and contentions at the trial. Mosher did not even see fit to invoice Graver for the work which it now claims was the subject of a "direct" contract. This contention, like the other complaint theories, obviously was designed to enmesh Graver, through Moore's testimony, in some form of oral bargain whereby plaintiff could recoup the loss caused by the joint ventures default.

The factual and legal situation of the parties demands the application of the Statute of frauds.

POINT II

THE COURT ERRED IN HOLDING THAT AN AGREEMENT EXISTED BETWEEN UNION AND IMI-WARD TO PAY MOSHER OUT OF FUNDS DUE THE JOINT VENTURE

SUMMARY OF ARGUMENT

The court below erred in concluding that Union and IMI-Ward had agreed that Union might pay Mosher for its work after acceptance by IMI-Ward and deduct Mosher's invoices from amounts becoming payable under the second tier subcontract. Such an agreement, if proved, would be subject to the defenses and inherent equities between Union and IMI-Ward. Following the joint venture's default, IMI-Ward had no claim for further payment from Union, and Mosher's claim was subject to the same limitation. Mosher would not be entitled automatically to recover the unpaid balance on the joint venture purchase orders but only to recover for losses sustained by breach of the alleged third party beneficiary contract. No such losses exist because Mosher has now secured a judgment against Ward which defendant is solvent and perfectly able to pay the debt for which it is primarily liable.

In Count VI of its amended complaint Mosher also alleged that Union and IMI-Ward "entered into an agreement for the benefit of Mosher" whereby in consideration of IMI-Ward's performance of its subcontract Union agreed to pay Mosher for its purchase order work out of funds due the joint venture (R. 277). This third party beneficiary count was introduced by amendment as an alternative theory of recovery in the event plaintiff failed to establish the existence of a contract between Mosher and Union. It apparently induced the court below to enter Conclusion of Law 8, which holds that "Union and IMI-Ward agreed that Union might pay Mosher for its work after acceptance of the work by IMI-Ward, and deduct Mosher's invoices from the contract price between Union and IMI-Ward" (R. 1239).

The court's conclusion concerning the existence of such an agreement is completely at odds with the conduct of the parties, which conduct demonstrates that no such agreement was contemplated. In the first place, had such an agreement been reached IMI-Ward would not have invoiced Union for Mosher's work because the joint venture would have expected Union to pay Mosher in the first instance. In fact, the joint venture drew invoices against Mosher's work and assigned such invoices to the California National Bank as security for a line of credit. (U.Ex. IIII, JJJJ, T-Y), (R.T. 555, 594). This conduct would have been a fraud on the bank if the invoices covered payments already relinquished to Mosher. Similarly Union would not have honored the assigned IMI-Ward invoices covering Mosher's work when presented by the bank because the funds for this work would already have been committed to Mosher by reason of the alleged third party beneficiary agreement. In fact, Union did honor the assigned invoices and did pay the bank (U.Ex. IIII), (R.T. 593) — an act which the court below is forced to conclude Union undertook to its own financial injury in the face of a contrary agreement. Finally, Mosher would have billed Union for its work had Page actually advised Moore that Union would pay direct and deduct the money from sums due the joint venture. In fact, Mosher at all times billed the venture (Jt.Ex. 14) and looked to Union for payment on an alleged oral guaranty only after the joint venture's default. This universal disregard by all the parties of the agreement predicated by the court is the best evidence that no such agreement ever existed.

It is true that on December 11 Union received the joint venture's authorization to pay Mosher sums for work of "approximately \$225,000" and to deduct such sums from monies falling due under the second tier

subcontract (Jt.Ex. 26, R. 1231). However, the record unequivocally establishes that this authorization letter was sent pursuant to Page's prior advice to the joint venture that a guaranty for Mosher "would be considered only upon the written request of Mr. John which must include an agreement that any payment made by Graver to Mosher would then be withheld from IMI-Ward's progress payments" (U.Ex. K). Page's desire for a written request before even considering the guaranty question was wholly understandable because he did not wish to place Graver in the position of a volunteer. If a guaranty were made and eventually had to be honored, a serious question could arise with respect to Union's right to reimbursement in the absence of joint venture consent to such a guaranty. See *Schuman v. Arsht*, 249 Ill. App. 562, 567 (1928):

"... [A] guarantor is not entitled to indemnity for amounts which he has paid under a guaranty entered into by him voluntarily without the request or knowledge of the principal obligor."

See also Stearns, *Law of Suretyship* (4th Ed.), § 259 at p. 467; *Brandt, Suretyship and Guaranty* (3d Ed.), Vol. I p. 463; 38 C.J.S., *Guaranty*, § 111, at pp. 1299 and 1300.

Page, of course, had already left Union when the joint venture's authorization letter arrived on December 11, and Union's officer's decided against extending a general guaranty on the basis of that letter. Accordingly, there was no offer and acceptance which could create a contract between Union and the joint venture with Mosher as the contemplated third party beneficiary. *Joseph v. Donover Corp.*, 261 F.2d 812, 820 (C.A.9, 1958).

But even if such a contract could be fabricated on the basis of the record, that third party beneficiary con-

tract could never be enforced by Mosher under the circumstances of this case. It is fundamental contract law that a creditor-beneficiary or donee-beneficiary never obtains any better rights under a third party beneficiary contract than those which the promisee, or in this case, the joint venture, would have. See *United States v. Campbell*, 139 F.2d 424, 426 (C.A.4, 1943): "In general, it is true that the rights of a third person to sue on a contract entered into for his benefit are no greater than those of the parties thereto, and the beneficiary who seeks to take advantage of the contract must take it subject to the defenses and inherent equities between the promisor and promisee. *Restatement of Contracts*, §§ 140 and 476(e) [Citations]."

Restatement of Contracts, § 140, states that if a contract ceases to be binding in whole or in part because of the present or prospective failure of the promisee to perform a return promise which was the consideration for the promisor's promise, "the right of a donee-beneficiary or creditor-beneficiary under the contract is subject to the same limitation." As an illustration of this principle, the *Restatement* gives the following example: "B promises A to pay C \$100 in consideration of A's promise to B to perform stated services for him. A substantially breaks his promise to perform the services. Whether or not at the time of B's promise C had a right against A to be paid \$100 he has no right against B" (Illustration 5).

In the present case *Mosher's invoices did not become payable until after IMI entered bankruptcy* on February 2 and defaulted in the performance of the joint venture subcontract work (Jt.Ex. 14, R.T. 367, 381). At the time of the default there were no monies owing the joint venture under the second tier subcontract and Union had actually over-paid in the amount

of approximately \$74,000. Accordingly, there were no monies due and payable which Mosher could recover as a third party beneficiary, and the court erroneously concluded that “the existence of an indebtedness from Union to IMI-Ward against which Union might charge what it paid to Mosher” was not a condition precedent to its obligation to pay (R. 1239).

This error is clearly demonstrated by the decision in *Alexander H. Revell & Co. v. C. H. Morgan Gro. Co.*, 214 Ill. App. 526 (1919) — Illinois law being applicable as the place of alleged contracting. There the Morgan company had entered into a contract with one Lidke, an electrical contractor, to perform certain electrical work and install fixtures at Morgan’s premises. During the course of the work the parties entered into an agreement whereby Morgan undertook to pay Lidke’s account with his supplier, Revell, out of funds to become due to Lidke for performances of the contract work. Lidke never completed the work and Revell sued Morgan on the agreement contending that the arrangement constituted a third party beneficiary contract. The court held that such a claim simply could not be advanced when the consideration due Morgan, performance of the contract by Lidke, was never received. The court stated, at p. 529:

“And all the authorities hold that where a contract is entered into by two parties for the benefit of a third, the third party’s rights are subject to the equities between the original parties. [Citations.]”

See also *Gallop v. Continental Casualty Co.*, 290 Ill. App. 8, 7 N.E. 2d 771, 773 (1937). (“ . . . [I]t is a well recognized principle that where a contract is entered into by two parties for the benefit of a third, the third person’s rights are subject to the equities be-

tween the original parties springing out of the transaction between them.”) The identical rule of law prevails in Mosher’s home jurisdiction. *Citizens National Bank v. Ross Const. Co.*, 146 Tex. 236, 240, 206 S.W.2d 593, 595 (1947).

Finally, and most important, Mosher has suffered no loss by breach of the alleged third party beneficiary contract. Any such contract would have constituted a form of suretyship arrangement. Any claim against Union on this theory, therefore, would arise only because IMI-Ward, which received payment from Union, failed in turn to pay Mosher for the work it had performed for IMI-Ward. However, Mosher has now recovered a judgment against Ward in this action for the full amount due, and Ward is unquestionably solvent and able to satisfy that judgment. This recovery against Ward is sufficient to make Mosher whole for the loss sustained and no further damage remains to warrant a further judgment against Union as a party in the position of a surety under an alleged third party beneficiary contract.

In *Wolters Village Manage. Co. v. Merchants & P. Nat. Bank*, 223 F.2d 793 (CA.5, 1955), the Court of Appeals reversed the entry of judgment on a third party beneficiary claim where the party primarily liable was also a defendant and the plaintiff was able to satisfy his claim against that defendant without resort to the promisor. The Court declared, at p. 799:

“We are satisfied that all the elements of an enforceable promise for the benefit of a third party were present; that the promise itself was not subject to any conditions; and that it was breached. *Therefore, the Bank may recover. But we think the court below applied an incorrect measure of damages.* The Bank is not necessarily entitled to recover the unpaid balance of its loans to Central,

but only for the losses caused by the breach of contract. *Since it appears that the Bank has other security and it does not appear that the partners Moody and Falck cannot pay the debt for which they are primarily liable, the Bank's recovery must in any event be diminished to the extent that it can recover from those sources.*" (Emphasis added.)

Accordingly, the Court remanded the case to the district court in order to ascertain to what extent, if any, the plaintiff bank would be unable to recover from Moody and Falck as promisees under the third party beneficiary contract before resorting to the promisor Wolters.

In the present case the judgment entered by the court below in effect gives Mosher an option to seek satisfaction only against Union, which has already paid the joint venture for the work in question, or against Ward as the party primarily responsible. No justification exists for this type of option where Ward is solvent and is the only defendant who has not paid on account of the work performed by Mosher.

If Mosher contends it cannot make full recovery from Ward as the party primarily liable, its claim against Union, if not otherwise reversed on the grounds raised in this brief, must still be diminished to the extent that it can recover against Ward and the case must be remanded for that purpose.

POINT III

THE COURT BELOW ERRED IN HOLDING THAT MOSHER WAS NOT ESTOPPED FROM RECOVERING FROM UNION BY REASON OF HAVING SOUGHT AND RECEIVED A DISTRIBUTION IN THE IMI BANKRUPTCY ON THE REPRESENTATION THAT THE WORK PERFORMED WAS AN INDIVIDUAL OBLIGATION OF IMI

(Specification of Error No. 6)

SUMMARY OF ARGUMENT

The final judgment procured by Mosher against IMI in the IMI bankruptcy proceeding constituted an irrevocable election by Mosher to treat the work performed pursuant to the November 3, 1961, purchase orders as the sole and individual obligation of IMI and not as the obligation of the IMI-Ward joint venture or of Union. Having discharged Ward from liability by reason of the position taken in the IMI bankruptcy, such action by Mosher necessarily discharges Union as a party secondarily liable.

On August 9, 1962 Mosher filed a \$321,000 proof of claim against IMI in the Chapter XI bankruptcy proceedings in the United States District Court for the Southern District of California, Central Division, on the ground that the work performed pursuant to the November 3 purchase orders was an individual and independent liability of the debtor IMI (U.Ex. D). Attached as an exhibit to the proof of claim were substantiating invoices which declared the purchaser to be "Idaho-Maryland Industries, Inc., 13103 Ventura Boulevard, Studio City, California."

In the sworn claim filed in the IMI bankruptcy proceedings Mosher purported to reserve its rights against Ward and Union, but nowhere asserted that the work in question had been performed either pursuant to an order from the IMI-Ward joint venture or under a direct contract with Union. On December 31, 1963 a final judgment was entered in the Bankruptcy Court which allowed Mosher's claim against IMI in the full amount of \$321,053.54 as a "general unsecured claim". The Referee ordered issued to Mosher in settlement of its claim certificates for 32,105 shares of stock in the reorganized IMI company. The value of the stock so distributed was \$52,170.62 (R.T. 682).

If Mosher's \$321,053.54 proof of claim in fact represented an individual obligation of IMI, then Mosher was entitled to have its claim allowed in full against IMI individually and to share equally with all other individual creditors of IMI in the assets of the debtor. On the other hand, if as Mosher has alleged in this proceeding, the purchase orders underlying its proof of claim created a primary obligation on the part of the joint venture, then under the provisions of Section 5(g) of the Bankruptcy Act, Mosher had only a claim as a creditor of IMI-Ward which should have been subordinated to the claims of individual creditors of IMI and should have received distribution only out of any surplus available after all individual creditors of IMI had been fully paid.¹²

Union submits that by having asserted a share in the individual estate of IMI on an equal basis with other individual creditors, Mosher was estopped in this action to change its position and now claim that the debt was in reality the obligation of IMI-Ward and Union. Having successfully assumed a position in the bankruptcy proceeding in order to advance its private interest, Mosher cannot now, simply because its interest has changed, assert a contrary position which would involve a contradiction of the grounds on which its previously proceeded. *Jamison v. Garrett*, 205 F.2d 15, 17 (App. D.C., 1953) *Essington v. Parish*, 164 F.2d 725, 730

¹² Section 5(g) of the Bankruptcy Act, 11 U.S.C. § 23, subdivision (g), reads as follows: "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each general partner to the payment of his individual debts. Should any surplus remain of the property of any general partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be distributed among the individual partners, general or limited, or added to the estates of the general partners, as the case may be, in the proportion of their

(C.A.7, 1947).

This was the exact holding in the Tenth Circuit's decision in *Eads Hide & Wool Company v. Merrill*, 252 F.2d 80 (C.A.10, 1958). In that case Eads filed an unsecured claim in the bankruptcy court against the estate of Chapman, based on two drafts totaling \$34,000 which Chapman had drawn on Eads for goods which Chapman failed to deliver. The claim was allowed in full and Eads shared as a general creditor in the distribution of the estate. Thereafter Eads brought a further action against Merrill on the same indebtedness, but now alleged that Chapman and Merrill had been partners in the business operation for which the drafts had been drawn. Eads alleged further that as Chapman's partner, Merrill was jointly and severally liable for the amount of the drafts and that the bankruptcy distribution had been insufficient to satisfy the entire indebtedness.

Merrill contended that Eads was estopped to allege that the indebtedness constituted a partnership liability because Eads had already secured a distribution in bankruptcy on a par with other general creditors only because of Eads' prior position that the debt was the individual responsibility of the bankrupt. But for Eads' prior contrary position Eads would not have been entitled to share in any distribution of the bankrupt's estate until the individual claims had been paid in full because of the provisions of Section 5(g) of the Bankruptcy Act. Having taken the position that Chapman was liable for payment of the amount covered by the drafts in order to secure a share of the bankrupt's estate, Eads could not now take an inconsistent position in order to further his private interest.

The Tenth Circuit affirmed the district court's de-

respective interests in the partnership and in the order of distribution provided by the laws of the State applicable thereto."

cision holding that Eads had precluded himself from asserting that the obligation was, in fact, a partnership obligation for which Merrill was also responsible. The Court declared, at p. 84:

“Related to the doctrine of election of remedies or rights, but based upon an inconsistency of position rather than a selection of means of enforcing a right, is a phase of equitable estoppel which prevents a litigant from maintaining that the facts of his suit are different from those which he urged successfully in prior litigation. *Davis v. Wakelee*, 156 U. S. 680, 15 S. Ct. 555, 39 L. Ed. 578; *Queenan v. Mays*, 10 Cir., 90 F.2d 525; *Conklin v. Cunningham*, 7 N.M. 445, 38 P. 170; *Armijo v. Town of Atrisco*, 56 N.M. 2, 239 P. 2d 535. Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.”

“Appellant has formerly asserted a right to share in the individual estate of a bankrupt partner on an equal basis with other individual creditors . . . [H]aving thus declared itself to be a creditor of Chapman individually through its acceptance of dividends to the detriment of other general creditors it must be held to be estopped to now claim that the obligation due it was a partnership obligation.”

In the *Eads* case the Tenth Circuit also quoted at length from the opinion in *Clapp & Son, Inc. v. Knorr*, 106 Kan. 733, 189 Pac. 935 (1920), where it was held that the plaintiff, in pursuing his claim in the bankruptcy court and in treating the bankrupt as the debtor on an obligation, was therefore estopped from asserting in a subsequent action that the defendant rather than the bankrupt was liable as the actual debtor. The Kansas Court stated, at p. 937:

“Even if Knorr might have been regarded in the

first instance as principal, and Reinhart [the bankrupt] as his agent, the plaintiff, having proceeded against Knorr [sic] as the owner of the goods, and the principal debtor, with full knowledge of the facts, is bound by its election. . . . The plaintiff, having procured the adjudication with knowledge of the contract relations, and having accepted dividends from the estate on that theory, is precluded from shifting its position and asserting that Knorr is a principal and a debtor.”

These decisions are also in accord with the holding of the Fifth Circuit in *In re Hurley Mercantile Co.*, 56 F.2d 1023 (C.A.5, 1932). In that case a bank procured a judgment against a partnership upon a promissory note executed by the partnership. A judgment was also rendered against the individual partners because of their liability under state law. The bank next filed a claim based upon the judgment against an individual partner in his individual bankruptcy proceeding. In refusing to allow this claim, the Court affirmed the Referee’s ruling, stating at p. 1025:

“The referee’s ruling was right. It is true that each partner is individually liable for every partnership debt, but for purposes of bankruptcy the partnership with its property and debts is considered a separate entity from the partners with their several estates and creditors. The Bankruptcy Act requires them to be kept separate for administration, and that partnership assets be first applied to partnership debts. . . . Bankr. Act Section 5 (11 U.S.C.A. Section 23). . . . Any other holding would disregard the requirement of Bankr. Act. Section 5(f), 11 U.S.C.A. Section 23(f), that the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each partner to the payment of his individual debts.”

See also *Schall v. Camors*, 250 Fed. 6, 8-9 (C.A.5, 1918),

aff'd 251 U.S. 239 (1919); *In re F. J. Hacker & Co.*, 225 Fed. 869, 872 (N.D.Ia., 1915), aff'd 238 Fed. 146 (C.A.8, 1916).

The foregoing authorities demonstrate that the final judgment procured by Mosher against IMI in the IMI bankruptcy proceedings constituted an irrevocable determination, as far as Mosher is concerned, that the work performed pursuant to the November 3, 1961 purchase orders was an individual obligation of IMI and not an obligation created by a "direct" contract with the IMI-Ward joint venture or with Union. Having shared in the individual assets of IMI as an individual creator of that debtor, Mosher cannot now escape the consequence of that position and assert a completely contradictory argument in this case in order to justify a further recovery.

Moreover, Mosher's position in this proceeding is that Union is responsible as a surety or person additionally liable for payment of the debt due from the joint venture. Any act of Mosher which discharges Ward from liability as a member of the joint venture necessarily discharges Union as well. In this regard, Section 44-142 of the Arizona Revised Statutes provides that a judgment shall not be given against a "party not primarily liable unless judgment has been previously, or is at the same time, given against" the principal obligor.¹³ This is in accord with the general principle of suretyship that any action by a creditor with relation to the prin-

¹³ A.R.S. § 44-142 in full text provides, "*Actions against persons primarily and secondarily liable on bill of exchange or other contract.* The acceptor of a bill of exchange, or any other principal obligor on any contract may be sued either alone or jointly with any other party who may be liable thereon, but judgment shall not be given against such other party not primarily liable unless judgment has been previously or is at the same time, given against the acceptor or other principal obligor, except when the plaintiff discontinues his action against such principal obligor." As to the applicability of this statute, see Footnote 15, *infra* pp. 69-70.

cipal debtor which prejudices the rights of the surety necessarily discharges the surety from its obligation. See *Atterbury v. Carpenter*, 321 F.2d 921 (C.A.9, 1963); 24 Am.Jur., *Guaranty*, § 87.

These matters were raised by Union in its answer and motion for summary judgment (R.1098, 621). Ward also filed a motion for summary judgment which alleged an estoppel based on the same circumstance (R. 1058). The court below erred in denying these motions and again in holding at the conclusion of the case that the plaintiff was not estopped from asserting its contrary claims in this proceeding after having secured a recovery from IMI individually as the person liable for the plaintiff's debt.

POINT IV

THE COURT BELOW ERRED IN DENYING UNION'S COUNTERCLAIM

(SPECIFICATION OF ERROR NO. 7)

SUMMARY OF ARGUMENT

The court below erred in denying Union's counterclaim which prayed that Mosher be ordered first to seek satisfaction from Ward before proceeding against Union. Union was entitled to this equitable relief as a matter of law because of the principal-surety relationship between these defendants with respect to Mosher's claim. No reason exists for affording Mosher the unrestricted opportunity to compel Union to pay twice on this claim when the principal debtor has thus far avoided all responsibility.

We submit that for the reasons assigned in this brief, the court below erred in entering a money judgment against Union. But in the event this Court should decide differently the fact remains that Mosher has

charged Union as a surety or party secondarily liable for an indebtedness the payment of which remains the primary responsibility of the defendant Ward.

Because of this fact Union filed a counterclaim against Mosher which alleged that under plaintiff's amended complaint Mosher claimed "that defendant Union Tank Car Company became a surety for the obligation of Idaho-Maryland Industries, Inc. and Ward Industries Corporation, a joint venture, and that as such surety this defendant is liable to plaintiff in the sum of \$321,053.54" (R. 295). The counterclaim prayed that the court determine the existence of this principal-surety relationship and that in the event Mosher recovers a judgment against both defendants, Mosher be ordered first to seek satisfaction from Ward before proceeding against Union.

Mosher moved to dismiss the counterclaim on the ground that it failed to state a claim upon which equitable relief could be granted (R. 423). After the trial court overruled the motion (R. 1688), plaintiff filed a reply which admitted the principal-surety relationship (R. 617).

For reasons unknown to this defendant the court below made no findings with respect to the counterclaim and failed to dispose of the same when entering its initial judgment on May 24, 1966. This fact was brought to the court's attention, whereupon the clerk, by direction of the court, entered a further judgment on June 20, 1966 (R. 1345) "that the defendant Union Tank Car Company take nothing by its counterclaim." However the court made no findings of fact or conclusions of law. We submit that on the record made in this case the dismissal was erroneous and that Union was entitled to the relief prayed for in its counterclaim.

A. NATURE OF THE RELIEF SOUGHT

The equitable relief sought pursuant to the counterclaim is provided in the Arizona Statutes concerning suretyship, A.R.S. § 12-1642, which states that where an action is brought against two or more defendants on a claim and one or more of the defendants is a surety for the others, upon establishment of that surety relationship any judgment shall be enforced first from the assets of the principal before resorting to the property of the surety.¹⁴ The statute further provides that the remedy made available to the surety exists regardless of how the principal-surety relationship was created. In this connection A.R.S. § 12-1646 states that “The remedy provided in this article for sureties extends to endorsers, guarantors, drawers of bills which have been accepted, and *every other suretyship, whether created by express contract or operation of law.*” (Emphasis supplied.)

The foregoing statutory provisions represent an outgrowth and codification of equitable principles whereby a surety might file a bill to compel a creditor to first sue the principal or to stay execution of any

¹⁴ A.R.S. § 12-1642 provides: “*Determination of issue between principal and surety; finding for surety and order of levy.* A. When an action is brought against two or more defendants upon a contract, and one or more of the defendants are surety for the others, the surety may cause the issue of suretyship between the defendants to be tried and determined at any time before the trial, but such proceedings shall not delay the action of the plaintiff. B. If the issue is determined in favor of the surety, the court shall order the sheriff to levy the execution first upon the property of the principal which is subject to execution and situate in the county in which the judgment was rendered before a levy is made upon the property of the surety, if enough property of the principal is found as in the opinion of the sheriff or constable is sufficient to make the amount of the execution, otherwise the levy shall be made on so much property of the principal as is found, if any, and upon so much of the property of the surety as is necessary to make the amount of the execution. The clerk shall make a memorandum of such order on the execution.”

judgment against the surety until satisfaction was first sought from the principal. The following are representative statements of this principle:

“A court of equity, before the surety has paid the debt, and for good cause shown, may at the instance of the surety and for his protection, require the creditor or obligee first to proceed against the principal debtor, . . .”

“In some jurisdictions the equity rule discussed . . . is now embodied in statutes under which the creditor may be required to resort to the property of the principal before proceeding against the surety.” 72 C.J.S., *Principal and Surety*, §§ 287(b) and 288(c).

“[T]he courts frequently recognize the right of the surety to go into equity to compell the creditor first to satisfy his execution from property of principal before resorting to that of the surety.” 50 Am. Jur., *Suretyship*, § 214.

A related application of the principle was involved in *Wolters* (discussed *supra*, at page 58), holding that where both promisor and promisee are sued on a third party beneficiary contract theory, the promisor is in effect the surety and the beneficiary must first seek satisfaction from the promisee before recovering damages from the promisor. See also cases collected in 4 *Williston on Contracts* (Rev. Ed.), § 1276, at p. 3643.

In the present case Arizona statutory law is applicable with respect to the counterclaim because matters pertaining to the nature of the judgment to be entered in an action are under established conflict of law principles governed by the law of the forum.¹⁵ The statu-

¹⁵ See 1 Beale, *Conflict of Laws*, § 8 A. 28, at p. 86: “The affording of a remedial right, being independent of the secondary right [i.e., the claim], is a matter solely to be determined by the sovereign from whom the remedy is demanded; in other words, the allowance of a remedy, the

tory remedy is no less available because the present action was brought in a Federal rather than an Arizona state court:

“[A] federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State.” *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945).

“[F]ederal courts should conform as near as may be — in the absence of other considerations — to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule.” *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 536 (1958).

B. THE PRINCIPAL-SURETY RELATIONSHIP

In the present cast Union is entitled to the equitable relief prayed for against Mosher under its counterclaim because the principal-surety relationship was not denied in Mosher's reply and was unquestionably proved during the course of the trial. Under its subcontract with Union the joint venture was legally obligated to perform the blast lock and levels 2 and 3 steel fabrication for the eighteen Titan missile silos at Davis-Monthan and for the five Titan missile silos at Vandenberg (Jt.Ex. 8). This was the work subcontracted to Mosher by the joint venture pursuant to their November 3, 1961 pur-

methods of carrying on the suit, the judgment, and the execution, are matters entirely for the law of the forum sought by the complaining party.” To the same effect see *Rest., Conflict of Laws*, § 600, p. 717: “The law of the forum determines matters pertaining to the execution of a judgment and what property of a judgment defendant within the state is exempt from execution and on what property within the state execution can be levied, and the priorities among competing execution creditors.”

chase orders (Jt.Ex. 9 and 10). Subsequently, the joint venture issued and assigned its invoices covering the blask lock and levels 2 and 3 fabrication work to the United California Bank, and Union honored them and paid that bank for the items of work in question.

The record further establishes that while Union paid IMI-Ward's assignee for the work completed by Mosher, the joint venture has never paid its indebtedness to the plaintiff except to the extent of the \$55,328.00 distribution made in the IMI bankruptcy. Moreover, both IMI and Ward by terms of their second tier subcontract with Union expressly agreed to hold Union harmless from any and all claims arising from work or materials furnished under that subcontract (Jt. Ex. 8). Therefore, as between Union and Ward, as a member of the joint venture, the latter is clearly responsible in the first instance for the payment of plaintiff's claim.

See 4 *Williston on Contracts* (Rev. Ed.) § 1211, at p. 3482, “. . . [I]f two persons are liable for the same debt or loss, and it is just that one of them should ultimately bear the burden wholly or beyond his share, that person is a principal and the other is a surety. . . .” Compare Rest., *Security*, § 82: “Suretyship is the relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and, as between the two who are bound, one rather than the other should perform.” Nor does the existence of this principal-surety relationship depend upon whether Mosher is suing Union as a principal or a guarantor, because whether a party is a surety “depends not on his relation to the creditor but on his relation to the principal debtor.” *Williston on Contracts* (Rev. Ed.) § 1211, at p. 3485; 72 C.J.S., *Principal & Surety*, § 32, at p. 527.

These circumstances certainly constitute good cause for granting the relief prayed for in Union's counterclaim. This Court is not confronted with a situation where Mosher has proceeded solely against a party secondarily liable, in which case granting the relief requested might unreasonably delay the plaintiff in securing recovery. Mosher has proceeded simultaneously against both Union and Ward and has now secured a judgment against each, which, if affirmed, can readily be satisfied from the assets of the defendant primarily responsible for payment. In equity and good conscience no reason can exist for affording Mosher an unrestricted opportunity to compel Union to pay twice on a claim for which the principal debtor has thus far avoided all responsibility whatsoever.

C. DUTY OF THE COURT TO ENTER FINDINGS AND CONCLUSION

Rule 52(a) of the Federal Rules of Civil Procedure provides in part:

“In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . .”

The United States Supreme Court on considering Rule 52 findings of facts by a district court stated:

“[C]onclusory, general findings do not constitute compliance with Rule 52's direction to ‘find the facts specially and state separately . . . conclusions of law thereon.’ While the standard of law in this area is not a complex one, we four think the unelaborated finding of ultimate fact here cannot stand as a fulfillment of these requirements. *It affords the reviewing court not the semblance of an indication of the legal standard with which the trier of fact has approached his task.*” *Commis-*

sioner of Internal Revenue v. Duberstein, 363 U.S. 278, 292-293 (1960). (Emphasis added).

The Ninth Circuit in *Irish v. United States*, 225 F.2d 3, 8 (C.A.9, 1955) stated:

“Findings of fact are required under Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A. The findings should be so explicit as to give the appellate court a clear understanding of the trial court’s decision, and to enable it to determine the ground on which the trial court reached its decision.”

* * *

“In a case where the necessary findings are lacking on the appeal, the court does not dismiss the appeal, but vacates the judgment and remands the case to the district court for appropriate findings of fact.”

The same principle applies when a counterclaim is involved. The court in *Island Construction Company v. Danielson*, 316 F.2d 161, 163 (C.A.3, 1963) said:

“But the Court made no findings of fact whatever concerning the transactions and events out of which this counterclaim arises, although Rule 52(a), Federal Rules of Civil Procedure, plainly contemplates and requires such findings, *Kruger v. Purcell*, 3rd Cir., 1962, 300 F.2d 830. There is merely a statement in the court’s conclusion of law ‘that the defendant is entitled to nothing as against the plaintiff on the basis of the counterclaim’. Without findings covering the essential facts, we cannot know the basis of the court’s conclusion that the counterclaim fails and, therefore, are not in position to review the merits of this matter. This part of the case must, therefore, be remanded for further proceedings.”

Union’s counterclaim was denied but no findings of fact or conclusion of law were entered to support this denial. A total lack of findings and conclusions does

not afford the reviewing court any indication of the legal standard with which the trier of fact approached his task. *Commissioner of Internal Revenue v. Duberstein, supra*. Nor is a bare order denying relief “so explicit as to give the appellate court a clear understanding to the trial court’s decision,” or to enable the appellate court to determine the ground on which the trial court reached its decision. *Irish v. United States, supra*.

The record amply demonstrates that Ward, as the remaining member of the joint venture, is the party primarily liable for Mosher’s claim, while Union, if liable at all, is secondarily liable. The judgment denying relief on the counterclaim should therefore be reversed. If Mosher’s judgment is sustained as to both appellants, then the case should be remanded for judgment to be entered requiring that plaintiff enforce its claim against the assets of Ward.

CONCLUSION

For each of the foregoing reasons, appellant Union Tank Car Company respectfully prays that the judgment entered May 24, 1966, by the United States District Court for the District of Arizona sitting at Tucson, Arizona, be reversed as to this appellant, in which event the appeal from the court’s judgment of June 20, 1966, denying this appellant’s counterclaim will become moot. If there is not a reversal as to this appellant, then we submit that the case should be remanded to the District Court for appropriate further proceedings on this appellant’s counterclaim and to determine what portion of Mosher Steel Company’s claim is collectible against Ward Industries Corporation as the party primarily liable.

This appellant further prays that it be awarded its costs of suit.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Harold C. Warnock

Of Counsel

APPENDIX
JOINT EXHIBITS

COUNSEL STIPULATED BEFORE TRIAL THAT JOINT EXHIBITS 1 THROUGH 82 MAY BE MARKED IN EVIDENCE. JOINT EXHIBITS 1 THROUGH 82, EXCLUSIVE OF 33 AND 36 WERE MARKED IN EVIDENCE.

Exhibit No.	Identified
1	
2	525 <i>et. seq.</i>
3	
4	
5	
6	433 <i>et. seq.</i>
7	
8	218 <i>et. seq.</i> , 469 <i>et. seq.</i> , 546 <i>et. seq.</i> , 607 <i>et. seq.</i> , 902 <i>et. seq.</i>
9	94 <i>et. seq.</i> , 152 <i>et. seq.</i> , 166 <i>et. seq.</i> , 170 <i>et. seq.</i> , 198 <i>et. seq.</i> , 304 <i>et. seq.</i> , 439 <i>et. seq.</i> , 445 <i>et. seq.</i> , 454 <i>et. seq.</i> , 797 <i>et. seq.</i> , 861 <i>et. seq.</i> , 935 <i>et. seq.</i>
10	94 <i>et. seq.</i> , 141 <i>et. seq.</i> , 152 <i>et. seq.</i> , 166 <i>et. seq.</i> , 198 <i>et. seq.</i> , 304 <i>et. seq.</i> , 439 <i>et. seq.</i> , 445 <i>et. seq.</i> , 454 <i>et. seq.</i> , 797 <i>et. seq.</i> , 861 <i>et. seq.</i> , 935 <i>et. seq.</i>
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12	79 <i>et. seq.</i> , 250 <i>et. seq.</i> , 351 <i>et. seq.</i>
13	137 <i>et. seq.</i> , 141 <i>et. seq.</i> , 148 <i>et. seq.</i> , 275 <i>et. seq.</i> , 1049 <i>et. seq.</i>
14	125 <i>et. seq.</i> , 375 <i>et. seq.</i> , 380 <i>et. seq.</i> , 433 <i>et. seq.</i>
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17	127 <i>et. seq.</i> , 347 <i>et. seq.</i> , 385 <i>et. seq.</i> , 445 <i>et. seq.</i>
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19	507 <i>et. seq.</i>
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21	526 <i>et. seq.</i>

22	325 <i>et. seq.</i> , 363 <i>et. seq.</i> , 411 <i>et. seq.</i> , 530 <i>et. seq.</i> , 699 <i>et. seq.</i>
23	540 <i>et seq.</i> , 762 <i>et. seq.</i>
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25	538, <i>et. seq.</i> , 903 <i>et. seq.</i>
26	524 <i>et. seq.</i> , 540 <i>et. seq.</i> , 725 <i>et. seq.</i> , 812 <i>et. seq.</i>
27	875 <i>et. seq.</i>
28	896 <i>et. seq.</i>
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32	842 <i>et. seq.</i>
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34	844 <i>et. seq.</i>
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44	101 <i>et. seq.</i> , 144 <i>et. seq.</i>
45	723 <i>et. seq.</i> , 768 <i>et. seq.</i>
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50	132 <i>et. seq.</i> , 199 <i>et. seq.</i> , 271 <i>et. seq.</i> , 912 <i>et. seq.</i>
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52	112 <i>et. seq.</i>
53	112 <i>et. seq.</i>
54	112 <i>et. seq.</i>
55	112 <i>et. seq.</i>
56	112 <i>et. seq.</i> , 432 <i>et. seq.</i>
57	112 <i>et. seq.</i>
58	112 <i>et. seq.</i> , 407 <i>et. seq.</i>
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60 96 *et. seq.*, 274 *et. seq.*
61 922 *et. seq.*
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70 272 *et. seq.*
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79 122 *et. seq.*, 317 *et. seq.*, 365 *et. seq.*
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PLAINTIFF'S EXHIBITS

Exhibit No.	Identified	Offered	Rejected	Received
1	p. 68 p. 200	p. 69	p. 70	p. 256
2	p. 99	p. 273		p. 274
3				
4		p. 329		p. 329
5		p. 329		p. 329
				p. 344
6	p. 376	p. 376		p. 377
7	p. 275	p. 275		p. 276
8		p. 801		p. 801
		(Def. Union's QQQQ)		

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13				
14				
15				
16				
17				
18				
18				
20	p. 201	p. 203	p. 203	
21				
22	p. 68			
22-1	p. 100 (Changed to 22-A)			p. 101
23	p. 680	p. 680		p. 680
24	p. 385	p. 385		p. 387
25				
26		p. 682		p. 1054
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30				p. 1056
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32	p. 67			
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34	p. 300			
35	p. 472			
36	p. 484			
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38	p. 656	p. 656		p. 656
39	p. 657			
40	p. 658	p. 658		p. 658
41	p. 661			
42	p. 666			
43	p. 669			
44	p. 893			

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CAR COMPANY**

Exhibit	No.	Identified	Offered	Rejected	Received
A			p. 948		p. 949

B	p. 949		p. 949
C	p. 421	p. 421	
	p. 729		p. 729
D	p. 428		p. 428
E	p. 426		p. 426
F	p. 949		p. 949
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VVVV	p. 1009	p. 1012		p. 1012
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YYYY				
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INDUSTRIES CORP.**

Exhibit No.	Identified	Offered	Rejected	Received
A		p. 840		p. 842
A1		p. 840		p. 842
A2		p. 840		p. 842
A3		p. 840		p. 842
A4		p. 840		p. 842
B		p. 842		p. 842
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B2		p. 842		p. 842
B3		p. 842		p. 842

B4	p. 842	p. 842
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Z		

United States Court of Appeals

FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD., *et al.*,
UNION TANK CAR COMPANY,
WARD INDUSTRIES CORPORATION,

*Appellants,
Cross-appellees,*

—v.—

U. S. A., EX REL MOSHER STEEL COMPANY,

*Appellee,
Cross-appellants.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF ARIZONA

OPENING BRIEF OF APPELLANT, WARD INDUSTRIES CORPORATION

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I. No contract of any kind was ever formed between Mosher and IMI-Ward. Mosher never bargained for, but on the contrary, explicitly refused to accept the credit of IMI, Ward, or IMI-Ward and never looked to or relied upon IMI, Ward or IMI-Ward for payment	53
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United States Court of Appeals

No. 21307, No. 21307A, No. 21307B, No. 21307C

FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD., *et al.*,

UNION TANK CAR COMPANY,

WARD INDUSTRIES CORPORATION,

Appellants,

Cross-appellees,

—v.—

U. S. A., EX REL MOSHER STEEL COMPANY,

Appellee,

Cross-appellants.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF ARIZONA

OPENING BRIEF OF APPELLANT, WARD INDUSTRIES CORPORATION

The defendant-appellant, WARD INDUSTRIES CORPORATION ("Ward"), now known as Dragor Shipping Corporation, appeals (R. 1351):¹

(1) From a final judgment for the sum of \$268,882.92, together with interest and costs, made and entered against it after trial by the United States District Court for the

¹ The Record on Appeal herein includes, as volume 8, the reporter's transcript of the trial testimony. All page references in this brief to the Record on Appeal will be prefixed by the letter R; all page references to the reporter's transcript will be prefixed by the letters RT, the lettering employed by the District Court in its Findings of Fact.

District of Arizona, Tucson Division, in favor of the plaintiff Mosher Steel Company ("Mosher"); and

(2) From the failure of the District Court to grant Ward's motion to dismiss Mosher's complaint against it upon the close of the plaintiff's case, as well as its motion to dismiss Mosher's complaint against it upon the close of the entire case.

The District Court granted a judgment against Ward in addition to the judgment which it entered in favor of Mosher against the defendants Union Tank Car Company (Union); Fluor Corporation, Ltd. (Fluor); and the sureties upon a Miller Act payment bond filed by Fluor (R. 1241). In its amended complaint, Mosher alleged, in brief, that it had fabricated and delivered to the defendant Union, pursuant to a verbal and written contract between Mosher and Union, certain steel owned by Union for Union's use in the erection of certain levels and structures at the Missile Launch Facilities near the Davis-Monthan Air Base at Tucson, Arizona (the Tucson project) and the Vandenberg Air Force Base at Vandenberg, California (the Vandenberg project).

The total amount of Union's contractual obligation to Mosher for Mosher's fabrication and delivery of Union's steel to Union for erection by Union upon the Tucson project was the sum of \$298,336.58; the total amount of its contractual obligation to Mosher for Mosher's fabrication and delivery of Union's steel to Union for erection by Union upon the Vandenberg project was the sum of \$22,716.96; and the balance remaining unpaid, after credits, to wit, the sum of \$268,882.92 was the amount for which Mosher was granted a judgment against Union by the District Court in this action.

The judgment against Ward was granted upon Mosher's claim that Ward "became *an additional obligor*" for the amount of Union's indebtedness to Mosher. (Amend. Compl., Count II, par. 3, R. 268.)

Jurisdictional Statement

Jurisdiction of the within appeal exists under and by virtue of Sections 1291 and 2107, Judicial Code, Title 28, U.S.C.

Statement of the Case

The plaintiff Mosher is a steel fabrication firm located in Texas with its principal offices in Dallas and Houston. It brought this action to recover the agreed value of the services which it rendered and the materials which it furnished to Union in the fabrication of certain steel owned by Union, under a written and oral contract with Union, for erection by Union at the Tucson project, as well as for a smaller project at Vandenberg, California.

The principal or prime contract for the Tucson project was issued to Fluor by the United States Army Corps of Engineers, Ballistic Missile Construction Office. Fluor had in turn subcontracted a substantial portion of the work required by the prime contract to the Graver Tank & Mfg. Company ("Graver"), a division of Union.² Under its subcontract, Union was required to purchase, fabricate and erect the steel required for certain levels and structures upon the project. Thereafter, Union subcontracted a por-

² In the Court below, the names "Union" and "Graver" are used interchangeably to designate the defendant Union Tank Car Company. The same useage of those names, interchangeably, to designate the defendant Union Tank Car Company will be utilized in this brief.

tion of its work, including the steel fabrication but not the steel erection, to a joint venture consisting of Idaho Maryland Industries, Inc. ("IMI") and Ward. Subsequently, Union removed the steel fabrication work from the joint venture subcontract and entered into an oral and written contract with Mosher for Mosher's fabrication of the steel purchased by Union for the Tucson project and the smaller project at Vandenberg, California, at which Union was likewise a subcontractor.

The District Court held, after trial, that Union was *directly, primarily and individually responsible under its oral and written contracts with Mosher* for the payment to Mosher of the value of the services performed and the materials furnished by Mosher to Union upon both the Tucson and Vandenberg projects. The Court thereupon directed a judgment against Union for the balance due and owing from Union to Mosher in the sum of \$268,882.92. Fluor, as the prime contractor upon the Tucson project and the sureties upon Fluor's Miller Act bond (Jt. Exh.³ 49), were held liable for the sum of \$246,165.95, since neither Fluor nor its sureties were involved in the Vandenberg project.

Mosher's own testimony upon the trial conclusively destroyed its contention that Ward "became an *additional* obligor to plaintiff" for the monies due and owing to it from Union. Each of the four individuals whom Mosher called to the witness stand—Paul E. Mitchell (Mitchell), Mosher's Senior Contracting Engineer; R. L. Burton (Burton), Mosher's Vice-President; Russell L. Moore (Moore), Mosher's Treasurer and General Credit Manager; and Sam A. Wilson, formerly General Manager

³ The letters "Jt. Exh." refer to the Joint Exhibits introduced in evidence upon the trial.

of the Denver Steel and Iron Division of Idaho-Maryland Industries Inc. (IMI)—testified unequivocally that it was Union, *and Union alone*, which employed Mosher to perform the fabrication of steel owned by Union; that Mosher relied *entirely and exclusively* upon the credit of Union; that it looked *solely and only* to Union for payment; that it would not, *and did not*, at any time, extend any credit whatsoever to IMI, Ward or the joint venture of IMI-Ward; and that from the commencement of its work until its completion, *it had never looked to or relied upon IMI, Ward or IMI-Ward for the payment of any of the services or materials* for which this action was brought.

The testimony of Mosher's own witnesses, and every writing produced by it upon the trial, so completely demolished its claim against Ward that it is impossible to comprehend the rationale of the District Court's failure to grant Ward's motions for a dismissal at the close of the plaintiff's case and at the close of the entire case; or the District Court's direction, sixteen months after the conclusion of the trial, of a judgment against Ward, in addition to the judgment entered against Union.

The Issues Presented by This Appeal

The sole issue upon this appeal is whether or not Ward can be held liable to Mosher for the labor and materials performed and furnished to Union by Mosher, pursuant to its express oral and written contract with Union, upon steel owned by Union where, concededly, Mosher was never employed by Ward; its services were never performed for Ward; its materials were never furnished to Ward; Mosher adamantly rejected the credit of Ward; and Mosher concededly never looked to or relied upon Ward for payment.

To apprehend the total absence of any factual or legal basis for the judgment entered by the District Court against Ward in this action, we turn to a review of the proceedings and proofs before the Court below.

The Causes of Action Alleged Against Union and Ward in Mosher's Amended Complaint

The amended complaint of the plaintiff herein (R. 268) sets forth seven counts, all of them, with the exception of Count III, being causes of action against Union. Only two of the counts, Counts II and III, are alleged against Ward.

1. Mosher's Causes of Action Against Union

In its first cause of action against Union, Fluor and the sureties, Mosher sues upon the Miller Act payment bond filed by Fluor. It is alleged that Mosher furnished, fabricated and delivered certain steel incorporated in the Tucson project "*at the special instance and request of Union Tank Car Company . . .*"; that Union failed to pay the agreed price and reasonable value thereof; and that Union, Fluor and the sureties are liable for said amount. (R. 268-270) In its remaining counts, Mosher alleges that it furnished, fabricated and delivered certain steel to the Tucson and Vandenberg projects "*at the special instance and request*" of Union, and that Union failed and refused to pay the agreed price and reasonable value thereof, amounting to the total sum of \$321,053.54.

2. Mosher's Causes of Action Against Ward

The amended complaint of the plaintiff sets forth two causes of action, Counts II and III, against Ward.

In Count II, the plaintiff alleges that certain steel was furnished, fabricated and delivered by the plaintiff "at the

special instance and request of Union Tank Car Company". (R. 271-273). It is then alleged that, *in addition*, "the said *Joint Venture* and Ward Industries Corporation, Defendant, as *joint venturer*, agreed to pay Plaintiff for furnishing, fabricating and delivery of said materials the agreed price and reasonable value of \$298,336.58 * * *" and that, "In so agreeing, Ward Industries Corporation, Defendant, became an *additional* obligor to Plaintiff for said sum". (R. 272).

In Count III, the plaintiff alleges that Ward and IMI were "*joint adventurers* pursuant to a written contract"; that "on or about November 3, 1961, the *joint venture* comprised of Idaho Maryland Industries, Inc., and Ward Industries Corporation *agreed to pay Plaintiff* for furnishing, fabricating and delivery of materials of the agreed price and reasonable value of \$298,336.58" for the Tucson project and \$22,716.96 for the Vandenberg project; that the defendants, Ward Industries Corporation and Idaho Maryland Industries, Inc. have failed and refused to pay the plaintiff the sum of \$321,053.54"; that "Idaho Maryland Industries, Inc. has been reorganized and a plan confirmed under Chapter XI of the Bankruptcy Act"; and that "defendant Ward Industries Corporation is liable unto the plaintiff, Mosher Steel Company, for the aforesaid sum * * *" (R. 273-274).

Ward's Answer

As appears from the denials contained in its answer (R. 29-30; 327-330), Ward has emphatically denied, from the very inception of this action, that Ward or the joint venture had ever incurred any liability to the plaintiff, or that the plaintiff had ever accepted, or relied upon, the credit of the joint venture, or either of its members, or had *ever looked to the joint venture, or either of its*

members, for payment. In addition thereto, Ward alleged in its fourth affirmative defense that “*if*” the plaintiff had delivered any steel or other materials to IMI, such delivery was made *for the individual account and upon the individual credit of IMI and not for the account or credit of Ward nor “as an agent or member of a partnership or a joint venture.”* (R29; 239)

Mosher’s Proofs Upon the Trial

Mosher’s causes of action against Ward were predicated solely and exclusively upon the testimony of the four witnesses whom it called to the stand: Mitchell, its Senior Contracting Engineer; Burton, its Vice-President; Moore, its Treasurer and General Credit Manager; and Wilson, formerly General Manager of the Denver Steel and Iron Division (Denver) of IMI.

By their unqualified admissions, these witnesses whom Mosher itself had called irrevocably destroyed its claim against Ward. Their testimony conclusively established:

Firstly, that, in this transaction, Mosher relied entirely and exclusively upon the credit of Union; contracted with no one but Union; and looked solely and only to Union for payment; and

Secondly, from the commencement of its performance until the completion thereof, it had refused to accept, and continuously rejected, the credit of Ward, IMI or the joint venture, and had never looked to Ward, IMI or the joint venture for payment. It was not until Mosher consulted its attorneys, after the bankruptcy of IMI, that it devised the theory, as an obvious afterthought, of “an additional obligor” which it invoked against Ward in this lawsuit. In the pursuit of that theory, as we shall show below, the

plaintiff's officers in their testimony deliberately substituted the words "IMI-Ward" whenever the word "IMI" was actually used in the events described, ignoring their oaths in their concerted endeavor to impose an unwarranted liability upon Ward by the resultant distortion of the facts.

Union's Authorization of Wilson, Denver's General Manager, to Purchase the Raw Steel on its Behalf

Under its subcontract with Fluor, Union was obligated to purchase, fabricate and erect steel required for Levels 2 and 3 and the Blast Lock structure at the Tucson project (Jt. Exh. 2). Under its subcontract from Matich Bros. and Sundt, it was similarly obligated to purchase, fabricate and erect the structural steel for Level 2 at the Vandenberg project (Jt. Exh. 4). Thereafter, Union subcontracted to the joint venture of IMI-Ward (Jt. Exh. 8) the work of fabricating the raw steel, reserving the task of erection for itself.

Thus, Middleton, Union's Assistant Project Manager at Tucson and previously Assistant to Lancaster, Union's Vice-President of Construction (Middleton, RT 545), testified that, under a first tier subcontract from Fluor, "Graver Tank & Manufacturing Company had the steel package" (Middleton, RT 544) and that, under the joint venture subcontract, the joint venture was required to fabricate the raw steel which was to be installed by Graver at the site (Middleton, RT 600):

"Q. (By Mr. Warnock) Regarding the steel that was furnished by Mosher, do you know who *installed* that material at the sites?

A. *Graver Tank & Manufacturing Company.*

Q. Didn't IMI-Ward have a contract?

A. *Not for installation, only for furnishing.*

Q. Didn't the contract call for installation of the steel by IMI-Ward?

A. *Not the structural steel.* The only thing they actually physically installed on the sites was the silo closure door, fabricated and installed."

Prior to October 13, 1961, the task of fabrication had been assigned by IMI to its Denver Steel and Iron Division whose general manager was Sam A. Wilson. To purchase the raw steel, Union had previously authorized Wilson to negotiate on its behalf with various steel companies and advise the steel companies, when negotiations were satisfactorily concluded, that Graver's purchase orders would be issued for the steel (FF 16, R 1225). All of the raw steel required for the Tucson and Vandenberg projects was purchased by Union under Wilson's authorized negotiations on behalf of Union and his authorized representations to the steel companies, carried out by Union, that Graver's purchase orders would be issued therefor. (FF 17, R 1225)

**The Meeting Between Mitchell and Burton of
Mosher and Wilson of Denver in Dallas
on October 13, 1961**

Because of an accelerated delivery schedule, Union officials became concerned, prior to October 13, 1961, that Denver's production facilities were not adequate to fabricate Union's raw steel and deliver the fabricated product to Union within the time required by the delivery schedule. (Wilson, RT 180, 183; 184-185) In the last week of September, 1961, Lancaster, Graver's Vice-President for Construction, and Harle, its Director of Purchases, "expressed considerable concern and were quite insistent on an im-

proved delivery schedule by whatever means necessary." (Wilson, RT 185) Wilson surveyed the situation locally in Denver but could find no one to take on the work. (Wilson, RT 232)

On October 10th or 11th, a meeting was held in Wilson's office in Denver which was attended by Messrs. Lancaster and Harle. (Wilson, RT 185) During that meeting, Wilson was directed by the Union representatives "to place the work elsewhere to meet delivery." (Wilson, 186; 232) He then thought of Mosher as a possible fabricator; mentioned Mosher's name to Lancaster and Harle; and received their approval. (Wilson, RT 232-234) Before he telephoned Mitchell at Dallas, Wilson told Lancaster and Harle that "Mosher would not accept the credit of Denver Steel and Iron and *that a Graver purchase order would have to be forthcoming* if Mosher was to do any work at all." (Wilson, RT 233) Lancaster and Harle told Wilson that "*a Graver purchase order would be forthcoming*" if he could negotiate a satisfactory deal. (Wilson, RT 234)

Wilson arrived in Dallas on October 13th and met with Mitchell and Burton. (Wilson, RT 186; 234) Mitchell testified that, after agreeing with Wilson upon all of the terms and provisions of a fabrication contract, the following transpired (Mitchell, RT 74-75):

"Q. (By Mr. Purnell) Now, you told us what you said to Mr. Wilson. Now, not discussions, but what did Mr. Wilson say to you, as well as you can recall?

A. I further asked Mr. Wilson how he proposed to handle this order. Mr. Wilson said to me *that he knew that we would not accept Idaho-Maryland Industries' credit for this amount of money* and he had checked with a Mr. Lancaster and a Mr. Harle of

Graver Tank and he was acting in their behalf to the extent that he would, *that Graver's purchase order would be forthcoming for us for any materials that we furnished.*

* * *

Q. Did you and Mr. Wilson and Mr. Burton cover all of the factors which you considered necessary to your understanding for the fabrication?

A. Yes, we did.

Q. Did Mr. Wilson indicate that he was satisfied?

A. Yes, he did."

Burton testified upon this score as follows (Burton, RT 247):

"Q. Well, you were telling us what happened on October 13. Go ahead and tell us.

A. Mr. Mitchell asked Mr. Wilson who the order would be entered to and Mr. Wilson said it would be entered to Graver Tank and Manufacturing Company *because he knew that our company would not accept the credit of Denver Steel and Iron, or IMI.*"

Burton also testified in his deposition as follows (Burton Deposition, pp. 50-52):

"Q. On October 13, 1961, when Mr. Sam Wilson came to your office in Dallas did he tell you something about the project for which he was attempting to enlist your company's aid?

A. He didn't go into great detail, he just said he was in trouble and needed help.

Q. And he explained that his own company, Denver Steel and Iron Works, could not fabricate the steel necessary for the Tucson project within the time prescribed?

A. That is correct.

Q. And he told you during the course of that conference that he was there for the purpose of making an arrangement with Mosher Steel Company for the fabrication of that steel within the time required?

A. That's right.

Q. And he also told you, did he not, on that occasion, and during the course of that conference *that he was appearing as an agent for Graver Tank & Manufacturing Company for the purpose of procuring this fabrication?*

A. That's right.

Q. Was the name of Ward Industries, Inc., mentioned at all during the course of that conference?

A. I am certain that it was. In what way, I don't remember, but I am certain that it was.

Q. But you have no present recollection at the present time of the manner in which that reference was made or the purpose for which it was made?

A. *The purpose for which it was made was on the matter of money, and he knew that we wouldn't accept the credit of IMI-Ward or Denver Steel and Iron.*

Q. Now, he said he knew that, did he not?

A. Yes sir.

Q. And there was no question in your mind, or in the mind of Mr. Mitchell at that time, that that was indeed the fact, *that Mosher would not accept the credit of Ward Industries, Inc., or Denver Steel and Iron Works?*

A. *That is the way it was presented.*

Q. And you made that perfectly plain to Mr. Wilson at that time?

A. There was no chance of misunderstanding that. We didn't make it plain, he made it plain to us.

Q. *And you agreed that that was the fact?*

A. *Yes.*"

During the course of the meeting on October 13, Mitchell called Moore at Houston and asked "if he would accept the credit of Graver Tank and Manufacturing Company." (Burton, RT 249) Moore promptly replied that the "Graver Tank credit was satisfactory." (Burton, RT 249) The rapidity with which Moore accepted the credit of Graver was attested by him as follows (Moore, RT 433-434):

"Q. I think you testified on your direct examination that your very first contact with this proposed project came in a telephone call from Mr. Mitchell on October 13, 1961, is that correct?

A. Yes.

Q. And Mr. Mitchell asked you whether or not credit of Graver Tank was good, is that right?

A. Yes.

Q. And you didn't hesitate at all, you told him that the credit of Graver Tank was good, did you not?

A. That's correct.

"Q. You didn't have to stop to make any investigation or obtain any credit report?

A. No."

On Monday, October 16th, Mitchell prepared, signed and mailed to Wilson a letter dated October 16th which constituted a complete agreement between Mosher and Graver under the express terms of which the plaintiff was to receive a formal purchase order from Graver. (Mosher Exh. 1) By the 16th, Wilson had returned to his Denver office and told Harle—before Mitchell's letter was received—of the agreement which he had reached with Burton and

Mitchell in Dallas. (Wilson, RT 235) Both Harle and Owenby of Graver, to whom Wilson reported, "were very pleased." (Wilson, RT 235-236)

The Letter Agreement of October 16, 1961 Between Mosher and Union

The letter of October 16, 1961 is precise and explicit. In the language of the District Court's Findings of Fact, it covered "the complete terms, prices and conditions of a contract for Mosher to fabricate steel required for the Tucson project. . . ." (FF 21, R. 1226)⁴ It is addressed to Graver and expresses Mosher's thanks for "*your order* covering the fabrication of approximately 1,200 tons of *your material* . . .". It notes that "we have entered our Shop Order 66109 to cover the fabrication of *your material* . . .". It provides that "It is agreed that a formal purchase order will be forthcoming from Graver Tank & Manufacturing Company to cover the fabrication of this material." The letter further states that "it will act as an interim purchase order pending receipt of Graver Tank & Manufacturing Company's formal purchase order."

Wilson signed the letter on October 20, 1961, in the space provided therefor (Mosher, Exh. 1, p. 3), handed a copy to Harle who was in his office at the time (Wilson, RT p. 184), distributed copies to IMI and Graver, and mailed the original back to Mosher. (Wilson, RT 184) To Wilson, it constituted "*the full and complete agreement.*" (Wilson, RT 184)

⁴ References to the District Court's Findings of Fact will be prefixed by the letters FF. References to its Conclusions of Law will be prefixed by the letters CL.

Harle asked Burton to come to Denver "to work out the mechanics of shipping papers, the usual sort of things in fabrication type of job." (Wilson, RT 185) Burton came to Denver on the 23rd of October and met with Harle and Wilson. (Wilson, RT 185) Harle, Burton and Wilson went over the letter of October 16th "item by item". (Wilson, RT 187) "*Mr. Harle assured Mr. Burton a purchase order would be forthcoming.*" (Wilson, RT 187)

According to Burton, the following transpired at the meeting of the 23rd (Burton, RT 257-258):

"Q. (By Mr. Purnell) Go ahead, Mr. Burton.

A. Mr. Harle also made the statement that this letter would serve as an interim purchase order until a formal purchase order could be sent to us by Graver, and that Mr. Wilson had signed it acknowledging it and had returned it to our Dallas office.

The Court: Harle said that?

The Witness: Yes, sir.

Q. (By Mr. Purnell) Did he give you any estimate of when to expect the formal purchase order?

A. He said it might be two or three weeks."

That Mosher regarded the letter of October 16, 1961, when signed and returned by Wilson, as a valid and subsisting contract, *unconditionally binding upon Graver and itself*, was confirmed by both Mitchell and Moore. Mitchell testified as follows (Mitchell, RT 151-152):

"Q. (By Mr. Lotterman) I think you testified that this document which is dated October 16, 1961, was returned, received by your office on or about October 20, 1961, with the signature of Mr. Wilson attached thereto, is that correct?

A. Received on October 26.

Q. Received on October 26. And when you received it, did you believe it to constitute a binding obligation of Mosher and Graver?

* * *

A. *Yes, I considered it a binding agreement.*

Q. Did you consider your company was unconditionally bound to perform the work and make the deliveries required by that document?

A. *Yes, I did.*

Q. Did you consider that when that work was performed and those materials were delivered that Graver would be unconditionally bound to pay the purchase price for that work and labor?

A. *Yes, I did."*

Moore was equally positive (Moore, RT 434-435):

"Q. Now, when did you first see the April 16, 1961, letter which we have called here the Mitchell-Wilson letter?

The Court: You're referring to April, these are October.

Mr. Lotterman: I mean October, I'm sorry, your Honor.

The Witness: I can't be sure, I think that the date would be sometime after October, immediately after October the 20th, I'm not positive as to the exact date.

Q. (By Mr. Lotterman) And when you first saw it did it bear Mr. Wilson's signature, or did it not?

A. Yes, sir, it did.

"Q. And did you consider that letter to be a binding and valid obligation?

A. *Yes.*

Q. *Of both parties?*

A. *Yes.*

Q. And it was then that you directed the shop order to be set up, is that right?

A. *Yes.*

Q. Had your company commenced engineering and other labor in connection therewith?

A. *Yes."*

Wilson, for Union, likewise testified that the letter of October 16, 1961, when signed, constituted "the full and complete agreement." (Wilson, RT 184)

Mosher's Performance Under the Oral Agreement of October 13 and Letter Agreement of October 16, 1961

Mosher moved swiftly, promptly and expeditiously to commence its work under the letter agreement of October 16, 1961. Even before that letter was received by Mosher with Wilson's signature thereon on October 26, 1961 (Mitchell, RT 69), Mitchell entered, on October 17, 1961, "the shop orders necessary for us to produce the product." (Mitchell, RT 78-79) being Mosher Order No. 66109 (Jt. Exh. 12) Shop orders are the "orders that we prepare for inter-company production of a product, *once we have agreed to do the fabrication.*" (Mitchell, RT 78) According to Mitchell, "no work will be done on any project without a shop order being prepared and issued." (RT 78)

The shop order (Jt. Exh. 12, RT 79) listed Graver as the "Customer" and provided that delivery was to start "11-11-61 at rate of 3 sites each 2 weeks." Both the bill of lading and the invoices were to be sent to the "Customer". It further provided that Mosher was to "fabricate cus-

tomer's material in accordance with customer's detail drawings required for Levels 2 & 3 & Blast Lock Structure" for the Tucson project. It also provided (Item 8) that "Customer to be invoiced at unit price #1 for all materials fabricated under Item #1 above"; that (Item 9). "Customer to furnish at no cost to Mosher all materials required to fabricate Item #1" . . .; and that (Item 12). "Customer is to pay any inbound or outbound freight we are required to pay. For this Customer is to be invoiced in accordance with price #3." The credit was marked "open" (Mitchell, RT 80), which meant that the customer's credit had been approved by the credit department. (Moore, RT 351)

Upon receiving a copy of the shop order at Houston, Burton took the drawings into the engineering department "and asked them to put it *on a crash basis*," to get the materials "into the shop just *as quick as they could*, because we had to get started working on it *at the earliest possible moment* in order to make the deliveries that I had agreed to make." (Burton, RT 250)

The plaintiff's weekly production records for the week ending October 24th showed that it had "considerable labor in the engineering department between October 18 and October 24" (Burton, RT p. 251), and also showed, during the week of October 23, a good deal of labor in the shop "in getting set up and trying to get off the ground". (Burton, RT 280) By November 16, Mosher had expended more than \$40,000 in shop work, fabrication costs and freight. (FF 24, R 1227) Until the week ending November 21st, 1961, the customer recorded upon these production records was "Graver Tank." (Pltff. Ex. 34; Burton, RT 333) Thereafter, and continuously until the completion of the plaintiff's performance, the customer was recorded as "Idaho-Maryland" (Pltff. Ex. 34; Burton, RT 333) The circum-

stances under which that change was effected, and the reasons therefor, will now be reviewed.

The Visit of Holmes and Orr of IMI to the Mosher Offices on October 31, 1961

According to Burton, on October 31, 1961, two men, Holmes and Orr, came to his office in Houston unannounced. (RT 261) They asked about the plaintiff's progress on the Tucson job and then inquired whether Mosher could also fabricate some steel for the Vandenberg project. (Burton, RT 261) After working out a schedule for Vandenberg which Burton felt that Mosher could meet, he was asked about a price. Burton replied that the matter of price came within Mitchell's province. (Burton, RT 262) That afternoon, Burton, Holmes and Orr met with Mitchell in Dallas and received a price for the additional Vandenberg work. (Burton, RT 262)

To this date, to wit, the afternoon of October 31, 1961, it was as clear as the noonday sun that Mosher was proceeding, on a crash basis, under a completely *concluded and binding contract* with Graver; that it was relying solely, entirely and exclusively upon the credit of Graver; and that neither Ward, IMI, nor the joint venture were involved in the Mosher transaction in any manner whatsoever. It was indubitably at this point in its preparation for trial that Mosher conceived of a testimonial strategem with which to sustain its legal theory of liability against Ward. Its witnesses proceeded to adopt in concert what appeared to be the simple and seemingly unassailable expedient of substituting the words "IMI-Ward" or "joint venture" whenever the word "IMI" had been used during the course of the conference. Thereupon, Burton testified as follows upon his direct examination (Burton, RT 262-264):

"Q. Go ahead, Mr. Burton.

A. *And during the course of that meeting they raised the question about changing our customer from Graver to IMI-Ward. And we replied that that would have to be approved by Mr. Moore, but we felt sure that he would not accept it without Graver being responsible for it, for payment of our work.*

* * *

Q. (By Mr. Purnell) I think the question was: *'Did they tell you why they wanted you to deal with IMI-Ward?'*

A. *They said it would be much easier and simpler for them, from the accounting standpoint, to have us accept an IMI-Ward purchase order.*

Q. Did you call Mr. Moore?

A. Yes.

Q. Where was Mr. Moore?

A. In Houston.

Q. And you called him from Dallas?

A. Yes, sir.

Q. What did you tell Mr. Moore?

A. I told him that Mr. Orr and Mr. Holmes were there in Dallas discussing this Tucson job and they wanted us to take on three more levels for Vandenberg *and asked the question if we would accept an IMI-Ward purchase order and I asked him what his feelings were in the matter. And he said, well, he didn't care whose purchase order it was as long as Graver would be responsible for payment."*

Burton's device of substituting the words "IMI-Ward" for the word "IMI" in his carefully amplified version of the conference with Holmes and Orr on October 31, 1961, was completely exploded on cross-examination. Burton's deposition had been taken in this case on June 27, 1963

(Burton, RT 338), and he had testified fully at that time to the meeting with Holmes and Orr. After his deposition had been transcribed, it had been sent to him for his examination and review. (Burton, RT 338) After reading it, he signed and swore to the truth of the transcript, whereupon it was filed in the District Court. (Burton, RT 338-339)

In his sworn testimony at that time, *Burton never mentioned the words "IMI-Ward" or "joint venture"* in describing what occurred on October 31, 1961. The record is crystal clear (Burton, RT 339; 340-342):

"Q. Now, on that occasion, on Page 23 in answer to a question this is what you said about October 31, 1961.

'On October 31 I recall Mr. Holmes and Mr. Orr of IMI came into my office and asked me if I was getting along with the Tucson job.'

Now, is that statement true?

A. Yes, sir.

Q. And then further you testified that you went with them to Dallas, and on Page 24 this was your answer:

'And then I went with them to Dallas and sat down with Mr. Mitchell and worked out things with the sales department, what they were concerned with. And during the course of events they raised the question about transferring the contract *from Graver to IMI.*'

Is that testimony true?

A. If that's what the record shows, that's right, I testified to that.

Q. (By Mr. Lotterman) And then in this deposition did you say, and I'll complete the answer; 'And then I went with them to Dallas and sat down with Mr. Mitchell and worked out things with the sales department, what they were concerned with. And during the course of events they raised the question about transferring the contract *from Graver to IMI*.

'We told them we did not have authority to do that, that it was understood when we took the order that it would be entered for Graver and I was sure that the credit department would not approve such an arrangement, but that we would get Mr. Moore on the telephone and let him talk to them about the matter.'

Is that testimony true?

The Court: Mr. Lotterman, I said a moment ago, the proper way to do this is to ask him if he made that answer.

Q. (By Mr. Lotterman) Did you make that answer upon the deposition taken of you in this cause back in June of 1963?

A. Yes, sir.

Q. I now read to you additional questions and ask you whether or not you made the answers as I read them.

'Question. And did you do that?

'Answer. Yes, sir.

'Question. Were you on the line?

'Answer. No, sir.

'Question. Did you step out in the hall?

'Answer. No, sir, I sat there and listened to one end of the conversation.

‘Question. What was said at that end of the conversation?’

‘Answer. Well, *they said* on account of bookkeeping or processing of the invoices and so forth for payment *that it would be better if the order or the invoices would be handled through IMI.*

‘Question. What else?’

‘Answer. I don’t know what Mr. Moore told them during that conversation. Of course, I know what he did tell them.

‘Question. What did you understand he told them?’

‘Answer. He told them *that it was all right with him whoever the order was transferred to, as long as Graver would be responsible for the payment of the material.*’

Did you make those answers to the questions which were asked of you upon your deposition?

A. Yes, sir.”

Mitchell’s tactic upon his direct examination had paralleled Burton’s. He, too, had testified that Holmes and Orr had advised him “that they were with the joint venture of Idaho-Maryland Industries and Ward Industries” (Mitchell, RT 89), and had requested the plaintiff’s representatives on October 31, 1961 to accept “a joint venture purchase order in lieu of the formal Graver purchase order” for the work involved. (Mitchell, RT 89) He also referred to the telephone call to Moore and Moore’s alleged statement “that we would not accept a joint venture purchase order unless Graver Tank assured Mosher of payment of all invoices.” (Mitchell, RT 90)

Mitchell’s attempt to embroider the factual cloth and thereby impose a liability upon Ward as an “additional obligor” was demolished as completely as Burton’s had

been. After he had vehemently denied that Holmes and Orr had actually used "the words IMI and not Joint Venture" and that they had wanted "to transfer the purchase order from Graver to IMI" (Mitchell, RT 158), he was confronted with an affidavit to which he had sworn on June 1, 1963 and reaffirmed during the course of his deposition in this cause. (Mitchell, RT 159-162) In that affidavit, which he reaffirmed anew as true and correct (Mitchell, RT 162), he had sworn as follows (Mitchell, RT 161-162; Ward's Exh. F, RT 163):

"A few days thereafter representatives of *Idaho-Maryland Industries, IMI*, appeared in affiant's office to discuss delivery dates and other details, and asked affiant and Mr. Ralph Burton, vice president of the Mosher Steel Company, whether Mosher Steel Company would deal in the matter with *Idaho-Maryland Industries* rather than with Graver Tank and Manufacturing Company. Such representatives were informed by affiant and the said Ralph Burton that Mosher Steel Company would not deal with *Idaho-Maryland Industries, IMI*, unless Graver Tank and Manufacturing Company remained liable under the agreement."

Following in the testimonial footsteps of Burton and Mitchell, Moore's contribution to Mosher's embellished version of the Holmes and Orr visit met with precisely the same fate. Moore testified that, on October 31, 1961, Burton called him from Dallas and told him that Holmes and Orr "had requested that we change the order from Graver to Idaho-Maryland-Ward Industries as it would be more convenient for accounting purposes, and asked if I would accept it on that basis." (Moore, RT 353) Moore told Burton that "we would accept it *providing*

Graver would be responsible for payment." (Moore, RT 354)

Moore's attention was directed to his sworn deposition in this cause upon this matter. At that time, he had testified as follows (Moore, RT 405):

"Q. Well, let me refer you to your deposition at Page 13 of the first deposition, Line 9.

'Question. Well, when did you first learn that the purchase order—' That is referring to the Graver purchase order—'had not been forthcoming?

'Answer. Well, the first time I learned it was about October 31, I believe.

'Question. *That was when Holmes and Orr came and wanted the customer to be changed to IMI?*

'Answer. *Yes.*

'Question. Did you meet with them?

'Answer. No, sir.

'Question. How did you learn about their request?

'Answer. Well, I heard it through the telephone conversation, I was called.

'Question. From Mitchell?

'Answer. Burton in Dallas.

'Question. From Burton in Dallas?

'Answer. *Yes.'*"

On further cross-examination, he testified as follows (Moore, RT 437):

"Q. (By Mr. Lotterman) All right. Now, during the course of your direct examination you had testified that Burton had told you that Holmes and Orr came in and wanted the customer changed. Do you remember that?

A. Yes.

Q. Well, now, to whom did they want the customer changed? *What name did they want to substitute?*

A. *They wanted the name changed to Idaho-Maryland for convenience.*

Q. And that's what you testified to on your deposition, is that correct?

A. (Affirmative headshake.)

Mr. McConnell: I don't think the record got his answer, he nodded his head.

The Witness: *Yes.*"

In view of the foregoing quotations from the record, can it be doubted that Mosher's attempt to add Ward as an "additional obligor" to Union had completely collapsed; that, in actual fact, Holmes and Orr had requested a change in the name of the customer to IMI "for convenience"; that the name of Ward or the joint venture had never been mentioned and that the request had been rejected unless Graver "remained liable under the agreement" (Mitchell, RT 161-162) and agreed to pay Mosher "direct." (Moore, RT 362)

**Harle's Conference With Mosher on November 7,
1961 and Moore's Telephone Talk With
Page of Graver on That Day**

On November 7, 1961, Harle, Graver's Director of Purchases, came to see Burton and Moore in Houston, to ascertain the status of contemplated deliveries because no shipment had been made as yet by Mosher. Harle was informed at that meeting that, because the "credit matter" had not been straightened out, Mosher had placed "a stop order" upon the very first shipment which was then virtually ready for delivery.

What transpired at that time was related by Burton on cross-examination as follows (Burton, RT 342-344):

"Q. (By Mr. Lotterman) Now, you were also examined during the course of this deposition to your meeting with Mr. Harle on November 7, 1961, and I ask you now whether you were asked the questions which I am about to read and made the following answers.

Mr. Watkins: What page?

Mr. Lotterman: Page 61.

'Question. Now, we come to your meeting with Mr. Harle on November 7, 1961. I think you testified that meeting took place in your office in Dallas?

'Answer. In Houston.

'Question. Mr. Harle came in and talked to you and Mr. Moore?

'Answer. That is correct.

'Question. And he came in for the purpose, as I understand it, of lifting a stop order which had been placed upon your very first shipment. That is he was concerned about the fact that shipment was not forthcoming?

'Answer. I don't think he knew there was a stop order on it when he came in. He knew shortly after he got there, but the time he came in I doubt he knew it.

'Question. But the purpose of his visit was to see that the shipment was forthcoming?

'Answer. Right.

'Question. That was the first shipment?

'Answer. The first shipment, which wasn't scheduled at that time to move until the following week.

‘Question. You explained to him the reason why the shipment was not forthcoming?

‘Answer. I explained to him that if we didn’t get the credit matter straightened out it would not be forthcoming.

‘Question. And then he called Mr. John Page at the Graver Company on the telephone in your office?

‘Answer. Yes.

‘Question. And he got Mr. Page on the wire?

‘Answer. Yes.

‘Question. Can you tell me what you heard Mr. Harle say to Mr. Page when he got him on the telephone?

‘Answer. He told Mr. Page that he had started working on an order in connection with the Tucson Missile Base and *that the IMI people had requested a transfer of the order to that name for accounting purposes, but that Mosher would not transfer the order until Graver would stand good for payment, and that Mr. Moore was present and that he would let him explain to him the problems involved.*

Did you make those answers to the questions which I have just read?

A. Yes, sir.”

And further (Burton, RT 346-347):

“Q. (By Mr. Lotterman) And then turning over to Page 64.

‘Question. Tell us what Mr. Moore had to say in substance.

‘Answer. *Mr. Moore said that IMI had requested a transfer of the order on the contract from Graver, but that we wouldn’t accept it without Graver being*

responsible for the payment of the material, and if that were forthcoming, then we would go ahead with the rest of the transfer.'

Did you make those answers as read to the questions which were asked upon the deposition?

A. Yes, sir."

Moore's Telephone Talks With Orr and Morton of IMI on November 13, 1961

On November 13, 1961, according to Moore, Orr telephoned him and asked him to accept "the order strictly on the credit of IMI-Ward Industries for shipment of the material." (Moore, RT 358) Moore adamantly refused. Then, according to Moore, Morton, IMI's president, got on the telephone and repeated the request. Again, Moore refused. "I told him", testified Moore, "*we would not accept it on that basis.*" (Moore, RT 359) Moore insisted that he would not release any of the shipments unless Union paid Mosher direct for Mosher's work. (Moore, RT 360) Moore's unqualified rejection, on November 13, 1961, of Orr and Morton's request ended all further attempts to induce Mosher to accept any credit in this transaction other than Graver's. (Moore, RT 360) "There wasn't much else to say after that." (Moore, RT 360)

Moore's Telephone Talk With Page of Graver on November 15, 1961

Moore testified on his direct examination that he called Page on November 15, 1961, and advised him that he would not release a shipment then ready for delivery, a shipment Harle was anxious to obtain, unless Graver agreed "*to pay us direct. . . .*" (Moore, RT 362) He testified that

Page did agree to do so and promised a confirmatory letter in a day or so. (Moore, RT 362) Upon the receipt of a telegram from Page on the following day, Moore released the shipment.

**Mosher's Exclusive Reliance Upon the Credit of Graver
and Its Adamant Refusal to Accept the Credit of
Ward, IMI or IMI-Ward**

Prior to November 15, 1961, when, according to Moore, Page had promised him "*that Graver would pay*" (Moore, p. 362), the Dallas office of Mosher had received on November 10, 1961, two purchase order forms of IMI. (Moore, pp. 439-440, Jt. Exs. 9 and 10) They were both signed by Frank J. Wright, buyer for IMI. (Mitchell, RT 153) One pertained to the Tucson project; the other to Vandenberg. Both contained the typed inscription: "*Confirming Agreement between Wilson, Mitchell and Burton dated 10/13/61.*" Both also contained the direction that all shipments were to be made to "Graver Tank & Mfg. Co." (Mitchell, RT 152, 154)

In accordance with Moore's instructions, these papers were kept by Mitchell on his desk in Dallas with "no action on them." (Mitchell, RT 169) They were not sent to Moore in Houston until November 17, 1961 (Moore, RT 441), two days after Moore's telephone conversation with Page and one day after Moore's receipt of Page's telegram and his release of the initial shipment.

On November 16, 1961, the day after Moore's conversation with Page, and simultaneously with the receipt of a telegram from Page, Moore released the order for shipment. (Moore, RT 365) On the same day, he instructed Mitchell to enter a supplement, #2, "to change customer's name from Graver Tank & Manufacturing Co. to Idaho-

Maryland Industries, Inc." (Jt. Ex. 13; Mitchell, RT 91-93; 169) The supplement also recorded the fact that "all shipments are to be made to Graver Tank and Manufacturing Co." at Tucson (Jt. Ex. 13). Under this supplement, the order was still marked "open." At the same time, Moore directed the entry of a shop order for the Vandenberg fabrication. (Pltff. Ex. 22A; RT 101)

It is unconditionally conceded by the plaintiff that its release of the shipment on November 16, 1961 and all subsequent deliveries, as well as the entry of Supplement #2, and the Vandenberg shop order were only induced by and undertaken solely in reliance upon Page's promise "to pay us direct. . . ." Moore testified in unequivocal language as follows (Moore, RT 445):

"Q. Now, I'd like to call your attention, Mr. Moore, to your testimony with regard to a telephone conversation with Mr. Page on November 15, 1961. After that telephone conversation you released the shipment, did you not?

A. Yes.

Q. *And your release of those shipments was based, was it not, upon Page's statements to you as you recounted them in your testimony?*

A. Yes.

Q. *You would not have released those shipments unless Page had made those statements to you, is that correct?*

A. *That's correct."*

Moore had made it unmistakably plain that "he didn't care whose purchase order it was as long as Graver would be responsible for payment." (Burton, RT 264) He had told Holmes and Orr "that it was all right with him *whoever the order was transferred to*, as long as Graver would

be responsible for the payment of the material." (Burton, RT 342)

As long prior to November 16, 1961 as September 19, 1961, Moore had known from a Dun and Bradstreet report of that date that a joint venture of IMI and Ward had been formed and had received a subcontract from Graver for certain missile construction work at Tucson. (Moore, RT 432; Jt. Ex. 56) Prior to the visit of Holmes and Orr, he had received reports from people who had been dealing with the joint venture about the credit of IMI and Ward (Moore, RT 437-438). Based upon those reports, he had concluded prior to October 31, 1961, that the credit of IMI, Ward and IMI-Ward collectively as a joint venture were completely *unsatisfactory*, a conclusion which was reinforced by credit reports which he subsequently obtained. Moore testified as follows upon cross-examination (Moore, RT 437-439):

"Q. (By Mr. Lotterman) Now, prior to this date you had reports and received reports of the credit of IMI, had you not?

A. Yes.

Q. And you had received reports, that is from people and buyers and customers who had dealt with the Joint Venture, you had reports of the credit of Ward, is that right, prior to October 31, 1961?

A. I had—

Q. I'm not talking about written reports, I'm talking about information which you had obtained.

A. Yes.

Q. In the trade?

A. Yes.

Q. *And on October 31, 1961 you had concluded that the credit of IMI was not satisfactory at all, is that right?*

A. *That's correct.*

Q. *And you also concluded the credit of Ward was not satisfactory at all?*⁵

A. *That is correct.*

Q. *And you concluded in addition that the credit of IMI and Ward collectively as a Joint Venture was not satisfactory at all?*

A. *That is correct.*

Q. *Now, on October 31, 1961 you would not accept the credit of Ward, would you?*

A. *No.*

Q. *Nor would you accept the credit of IMI?*

A. *No.*

Q. *Nor would you accept the credit of IMI-Ward collectively?*

A. *No.*

Q. *Now, you made your decision on October 31, 1961, not to accept those credits without any credit report, based upon prior information which you had gathered during the course of your business transactions?*

A. *That's right.*

Q. *And after this conversation you wanted to see if their credit, if the IMI-Ward credit, was really as bad as the people had stated it was, is that right?*

A. *I wanted a report, yes.*

Q. *And then you got reports?*

A. *Yes.*

⁵ None of Mosher's admissions that it had continually refused to accept the credit of Ward or the Joint Venture of IMI-Ward, precisely as it had refused to accept the credit of IMI, is reflected in the District Court's Findings of Fact or Conclusions of Law. The District Court's sole reference to this testimony by Mosher is the statement in CL 4 that "Mosher did not deal with, nor rely upon the credit of, IMI, individually . . ." (R. 1238). No reason is assigned by the District Court for its failure to refer, in CL 4 or elsewhere, to Mosher's refusal to deal with, or rely upon the credit of, Ward or the joint venture.

Q. *And it was precisely as bad as they said it was, isn't that correct?*

A. *It was not acceptable."*

Moore had likewise testified upon his deposition as follows (RT 466-467; Deposition, pp. 12-16; 16-18):

"Q. And as you recall, the letter in question did provide that there would be forthcoming from Graver a purchase order?

A. Yes."

• • •

"Q. Well, when did you first learn that the purchase order had not been forthcoming?

A. Well, the first time I learned about it was October 31, I believe.

Q. *And that was when Holmes and Orr came and wanted the customer to be changed to IMI?*

A. Yes.

Q. And did you meet with them?

A. No sir.

Q. How did you learn about their request?

A. Well, I heard it through a telephone conversation. I was called—

Q. From Mitchell?

A. Burton in Dallas.

Q. From Burton in Dallas?

A. Yes.

Q. *At that time did you make any investigation of the credit of IMI or Ward Industries?*

A. *Yes, I made an investigation after that in a conversation.*

Q. What kind of an investigation did you make, the regular routine of getting Dunn and Bradstreet reports and credit clearance? What sort of a credit clearance do you use?

A. Dunn and Bradstreet, and Wholesale Credit and Retail Credit".

* * *

"Q. Was this investigation made of both IMI and Ward Industries?

A. Yes, sir.

Q. *Was it satisfactory?*

A. *No, it was not satisfactory.*

Q. *Either as to Ward Industries or IMI?*

A. *In my opinion it was not satisfactory.*

Q. *Not satisfactory as to IMI?*

A. *No.*

Q. *Was it satisfactory as to Ward Industries?*

A. *I did not consider it satisfactory as to either one."*

* * *

"Q. What did you tell them?

A. I told Burton that we would not substitute IMI-Ward for the Graver contract without assurances from Graver that they would be on the contract.

Q. You told him that as soon as he phoned you?

A. Yes.

Q. Then why did you go to the trouble of investigating the IMI-Ward credit?

A. I had information before that the credit wasn't too good.

Q. I understood you to testify that after this call from Burton you requested reports from Wholesale Credit and Dun & Bradstreet on IMI-Ward?

A. That is correct, but I made the decision without the reports from previous information, not from credit reports.

Q. And what was that previous information?

A. I had been informed right from the very beginning that those they were dealing with stated that *the credit was no good for IMI-Ward Venture.*

Q. You mean the buyers themselves said their credit wasn't any good?

A. Certainly."

* * *

"Q. Well, if you had already decided that you were going to insist on Graver guaranteeing this contract, why did you go ahead and go to the expense of getting an IMI-Ward credit investigation?

A. Quite often we get credit reports on companies that are not—that we do not have contracts with.

Q. *Well now, why did you do it in this case?*

A. *Well, frankly, I wanted to see if it was as bad as they said it was.*

Q. *And was it?*

A. *Yes."*

In view of the foregoing testimony, it is not surprising that Mosher never signed or returned any acknowledgment copies, as the IMI purchase order forms of November 3, 1961 required upon their face. (Moore, RT 441-442; Mitchell, RT 156-157; Ward Ex. O) Those forms likewise provided that they were "subject to the terms and conditions shown on the reverse side hereof". (Mitchell, RT 170) Condition 1 upon the reverse side read in each instance as follows: "This purchase order constitutes a binding contract on the terms set forth herein when it is accepted by the seller, either by acknowledgment or commencement of performance." (Mitchell, RT 170) It is likewise not surprising that Mosher emphatically denied that it had commenced its performance for the Tucson project under those documents (Mitchell, RT 170-171) "Considering itself bound", Mosher commenced its performance, as the District Court itself had found, "under the October 13, 1961 oral agreement . . ." (FF 24, R 1227).

Mosher's Conclusive Admissions That it Had Never Looked to IMI or Ward for Payment From the Commencement of its Work Until its Completion

If there were the faintest doubt that Ward was completely innocent of any liability to the plaintiff in this transaction, that doubt was irrevocably dispelled by the unqualified, unconditional and conclusive admissions of Moore *that, from start to finish, Mosher had never relied upon or looked to IMI or Ward for payment*, even though it was sending invoices to IMI with copies to Union.⁶ (Moore, Dep. vol. 2, pp. 55-56) Those admissions are completely dispositive of the claims asserted in the plaintiff's amended complaint against Ward and require a dismissal of those claims as a matter of law. Moore's admissions under cross-examination are as follows (Moore, RT 446-447):

"Q. When did you send your first invoice to IMI for the work which your company was performing? What was the date of that first invoice?

A. I don't recall the first one, I recall the corrected ones. But they were on January 19, 1962.

Q. In spite of the fact that you were sending invoices to IMI, is it not a fact that you were not looking to IMI for payment of any of those invoices?

A. That is correct.

Q. *And from start to finish, from the beginning of the work of your company until its completion you never looked to IMI for payment, did you?*

Mr. Warnock: I object, that's a legal conclusion of the witness, even on cross examination.

⁶ None of these admissions by Mosher is reflected in the District Court's Findings of Fact or Conclusions of Law.

The Court: No, he may answer.

The Witness: *That is correct, sir.*

Q. (By Mr. Lotterman) *And you never relied upon IMI for payment, from the very beginning of this job until its conclusion, is that right?*

A. *That's correct.*

Mr. Lotterman: That's all.

One more question, I'm sorry.

Q. *And if you were not relying or looking to IMI for payment, you certainly weren't looking to Ward for payment, were you?*

A. *No."*

Moore further testified upon Graver's recross-examination (Moore, RT 453):

"Q. *Mr. Moore, you told Mr. Lotterman that you never did rely on IMI to pay you for this deal. Is that what you said?*

A. *Yes, sir."*

Moore confirmed the testimony which he had previously given upon his deposition as follows (Moore, RT 468-469; 471):

"Q. Mr. Moore, Mr. Warnock read to you from your deposition. I now want to ask you whether you were asked the following questions by Mr. Warnock during the course of your deposition and made the following answers. Page 31, Volume 2.

'Question. You said you were never looking to IMI for payment?

'Answer. No.'

There was then marked as Exhibit 3, a document which is marked as Joint Exhibit 8.

Mr. Warnock: Page 31, of which deposition?

Mr. Lotterman: Volume 2.

'Question. All right, I will ask you if it isn't true that on March 1, 1962, two weeks after your conversation with Tom Harle you didn't write the original of that exhibit 3 to IMI, sending them the invoices and showing them that that reconciled with the materials they received?

'Answer. Yes.'"

" * * * 'Question. *Then you were looking to IMI on that day, weren't you?*

'Answer: *No, huh uh.*

'Question: *You were invoicing them, weren't you?*

'Answer: *We invoiced them all along from the beginning.*

'Question: *But you never looked to them for payment?*

'Answer: *No, sir.'*

Mr. Lotterman: That is all.

Did you make those answers to the questions I read?

A. Yes."

The testimony of Mosher's witnesses which has been reviewed above, culminating in the conclusive and dispositive admissions of Russell Moore, its Treasurer and Credit Manager, so irretrievably destroyed the plaintiffs' claims against Ward in this case that any further discussion of fact or law would ordinarily appear to be superfluous. However, in view of the District Court's ultimate determination that Ward became an additional obligor for Union's indebtedness to Mosher, a review of the bases for that decision becomes essential.

The District Court's Findings of Fact and Conclusions of Law against Ward

The reasoning by which the District Court arrived at its conclusion that Ward became liable to Mosher for Union's debt is set forth in the last three sentences of Finding of Fact #39 (R 1232-1233) and #4 of its Conclusions of Law (R 1238) which read as follows:

"39. . . . By reason of Moore's telephone conversation with Page on November 15, 1961, and the telegram from Page of that date, Moore understood and had reason to understand that Graver would pay Mosher directly for all the work described in Jt. Exs. 9 and 10 in evidence. Moore authorized the supplement to shop order 66109 and the entry of shop order 66146 by reason of that understanding; and he permitted the release and shipment of the steel fabricated by Mosher pursuant to Jt. Exs. 9 and 10 upon that understanding. Had it not been for Page's statement to Moore on November 15 and Page's telegram of November 15, Mosher would not have accepted either IMI or IMI-Ward as its customer and it would not have proceeded with the work pursuant to Jt. Exs. 9 and 10 in evidence.

* * *

4. IMI, in all its dealings with Mosher, was authorized to and did act for and on behalf of IMI-Ward. In furnishing, fabricating, and delivering the steel for the Tucson and Vandenberg jobs pursuant to the terms and provisions of Jt. Exs. 9 and 10 in evidence, Mosher did not deal with, nor rely upon the credit of, IMI, individually, but Mosher performed pursuant to its agreement with IMI-Ward. Ward, as a member of IMI-Ward, is obligated to Mosher by reason

of Mosher's performance of the terms and provisions on Mosher's part contained in Jt. Exs. 9 and 10, in the amount of \$298,336.58 for steel furnished, fabricated and delivered to the Tucson job and in the further sum of \$22,716.96 for the steel furnished, fabricated, and delivered to the Vandenberg site."

The foregoing phraseology presents a series of virtual textbook examples of pseudo syllogisms: Major premises consisting of suppositions fashioned of non-existing factual cloth; equally suppositious minor premises extended and transposed in midstream; and the ultimate *non sequiturs* offered as logically demonstrated conclusions. Thus, according to the District Court:

(1) Mosher furnished, fabricated and delivered the steel for Tucson and Vandenberg, *not* under the oral agreement of October 13, the letter agreement of October 16 and Page's oral promise and telegram of November 15, *but only* "pursuant to the terms and provisions of Jt. Exs. 9 and 10 in evidence," i.e., the IMI purchase order forms of November 3, 1961.

(2) Moore had "reason to understand" from his conversation with Page on November 15 that Union would pay Mosher directly, *not* for the work which Mosher had been employed by Union to perform on October 13, as recorded in the letter agreement of October 16, *but only* for the work "described in Jt. Exs. 9 and 10 in evidence."

(3) Had it not been for Page's promise and telegram, Mosher would have refused to continue with its work, *not* under the oral agreement of October 13 and the written agreement of October 16, *but only* "pursuant to Jt. Exs. 9 and 10 in evidence."

(4) "Although Mosher did not deal with, nor rely upon the credit of, IMI individually", nevertheless Mosher "performed pursuant to its agreement with IMI-Ward"(!) and, *quod erat demonstrandum*, "Ward as a member of IMI-Ward is obligated to Mosher . . ."

We now turn to a detailed consideration of the insupportable hypotheses and factual misstatements which culminated in the District Court's conclusion that Mosher "performed pursuant to its agreement with IMI-Ward."

A. Mosher Did Not Furnish, Fabricate or Deliver the Steel to Union "Pursuant to the Terms and Provisions of Jt. Exs. 9 and 10 in Evidence".

On October 31, 1961, as previously noted (*supra*, pp. 20 et seq.), Holmes and Orr of IMI requested Mosher to change the name of the customer to IMI "for convenience" (Moore RT 437) because "on account of bookkeeping or processing of the invoices and so forth for payment that it would be better if the order or the invoices would be handled through IMI" (Burton RT 339-342). The request was flatly rejected. Holmes and Orr were informed by Mosher that a change in the name of the customer for the bookkeeping convenience of IMI would be effected upon its books *only if* Union unequivocally reaffirmed its existing obligation to pay Mosher direct under the oral agreement of October 13 and the letter agreement of October 16. Holmes and Orr stated that they would look into the matter further and let Mitchell know (Mitchell RT 90; FF 29, R 1228, 1229).

On November 10, 1961 Jt. Exs. 9 and 10 were received by Mitchell at Mosher's Dallas office (Moore RT 439-440). Mitchell was instructed by Moore to keep those papers upon his desk in Dallas with "no action on them" (Mitchell RT 169). By November 7, the date of Harle's visit to

Mosher to ascertain why no deliveries had been made, Moore had placed a "stop order" upon the very first shipment which was then virtually ready for delivery (*supra*, pp. 28 et seq.). The combined efforts of Harle, Orr and Morton could not lift that stop order. Moore would not release any of the shipments unless Union reaffirmed its obligation to pay Mosher direct for Mosher's work (Moore RT 360).

Not until Page had agreed on November 15 to pay Mosher "direct" (Moore RT 362) and promised a confirmatory letter was Moore induced, on November 16, and simultaneously with his receipt of Page's telegram, to take any action. It was then, and only then, and on November 16, that Moore released the order for shipment, instructed Mitchell to change the customer's name from Graver to IMI and directed the entry of a shop order for the Vandenberg fabrication. All of these acts were completed *before* Moore even saw, examined or read Jt. Exs. 9 and 10 which were then upon Mitchell's desk in Dallas. Those documents were not received by Moore in Houston until one day later, i.e. November 17, 1961 (Moore RT 441).

Moore paid no attention whatsoever to these documents after he received them in Houston. He testified (Moore Dep., Vol. II, pp. 47-48):

"Q. Now, did you examine these documents when you received them?

A. Yes.

Q. And did you observe the notation which appears on both, 'Confirming agreement between Wilson, Mitchell and Burton dated 10-13-61'?

A. Yes.

Q. Had you advised anybody in Idaho-Maryland Industries to send that document in?

A. I had not advised anyone to, no.

Q. Did Mr. Mitchell tell you whether or not he had asked Idaho-Maryland Industries to send that document in?

A. No.

Q. Had you by that time consented to the receipt of any purchase order from Idaho-Maryland Industries, Inc.?

A. I did not.

Q. Now, when those came in, what did you do with them?

A. Filed them.

Q. Did you communicate with Idaho-Maryland Industries in connection with them?

A. No.

Q. Did you instruct anyone in your company to communicate with IMI in connection with those documents?

A. No."

Although Jt. Exs. 9 and 10 required upon their face that, for acceptance, the accompanying acknowledgment copies be signed and returned, no such acknowledgment copies were ever signed or returned. (Moore, RT 441-442; Mitchell, RT 156-157; Ward Ex. O)⁷ As a matter of fact, these acknowledgment copies were still in the possession of Mosher long after this action was begun. They were annexed as Exhibits 7 and 8 to Volume II of Moore's deposition⁸ which is presently in the files of this court as an exhibit in this cause.

The typed inscription upon Jt. Exs. 9 and 10: "Confirming Agreement between Wilson, Mitchell and Burton dated 10/13/61"⁹ are, almost verbatim, the words contained in

⁷ This fact is not reflected in the District Court's Findings of Fact.

⁸ This fact is not reflected in the District Court's Findings of Fact.

⁹ The presence of this inscription upon each page of Jt. Exs. 9 and 10 is not reflected in the District Court's Findings of Fact.

the letter agreement of October 16, 1961 which expressly referred to the "agreement made on October 13, 1961 between Messrs. S. A. Wilson, Paul H. Mitchell and R. L. Burton." Obviously, therefore, Jt. Exs. 9 and 10 constituted an affirmation upon their face of the binding, conclusive and subsisting agreement between Mosher and Union of October 13, 1961, an agreement which contained, in the language of FF 21, "the complete terms, prices and conditions of a contract for Mosher to fabricate steel required for the Tucson project . . ." (R 1226).

Jt. Exs. 9 and 10 are merely a repetition, in *haec verba*, of the terms, prices and conditions of Union's previously consummated oral and written contract with Mosher. To say, as the District Court has said, that "Moore permitted the release and shipment of the steel fabricated by Mosher pursuant to Jt. Exs. 9 and 10 . . ." (R 1233) is to substitute a spurious verbalism for an existent and contrary fact.

Union's steel had been fabricated, as the Court itself had found (FF 24, R 1227), under the oral contract of October 13, 1961 and the letter agreement of October 16, 1961, and was released only upon Page's oral reaffirmation of Union's obligation to pay on November 15 and his telegram of the same date (FF 39, R 1233). On November 15, neither Moore nor Page referred by as much as a single word to the contents of the documents (Jt. Exs. 9 and 10) then sitting on Mitchell's desk in Dallas "with no action on them." (Mitchell, RT 169) In the entry of supplement #2 on November 16, Moore merely effected a change in the customer's name upon Mosher's books for the bookkeeping convenience of IMI and Union; he did not add a single term, provision or condition to those already contained upon the shop order which Mosher had entered more than a month before.

To Mosher, Jt. Exs. 9 and 10 were totally inconsequential. They had nothing whatsoever to do with Union's promise to pay for which Mosher had bargained and which alone induced the performance for which it sues. Mosher had no objection to accommodating the book-keeping needs of IMI or Union provided that Union's promise to pay were explicitly reaffirmed. Moore had made it clear, in terms too plain for misconstruction, that "he didn't care whose purchase order it was as long as Graver would be responsible for payment." (Burton RT 264). Union's obligation under the *oral agreement of April 13* and the *written agreement of April 16* (Mosher Proposed Finding of Fact #24, R 1390; Mosher Proposed Conclusions of Law, #s 1 and 2; R 1406) and its promise to Mosher under the *oral contract of November 15, 1961* (Mosher Proposed Finding of Fact #63; R 1397; Mosher Proposed Conclusions of Law #4; R 1407) were the only promises for which Mosher was willing to perform its work. They constituted the sole inducement for its performance and the only basis for its reliance from start to finish. The contrary assumptions implicit in the District Court's Finding of Fact #39 are totally unfounded.

**B. Jt. Exs. 9 and 10 Are Not IMI-Ward
Purchase Orders**

Mosher's attempt to transform Ward into an "*additional obligor*" by the device of substituting the words "IMI-Ward" or "joint venture" for the word "IMI" in describing the conference of October 31, 1961 with Holmes and Orr predictably generated a counter gambit by Union. Fastening upon the same linguistic technique, Union sought to transform Ward into a "*substitute obligor*" by contending that, on October 31, Mosher had agreed to accept the credit of IMI-Ward as a substitute for, and in lieu of, the credit of Union.

For that purpose, Union called Wallace W. Orr, a former IMI employee (RT 821-824, 847), to the stand. Orr promptly demonstrated his testimonial trustworthiness by swearing that Union had transported him from Chicago to Tucson and placed him on the witness stand without knowing what he would testify to (RT 820). He further swore, unconditionally, that no contract had ever been formed between Mosher and Union, either as a result of the conference of October 13 between Wilson, Mitchell and Burton, or the letter agreement of October 16, (RT 791, 815, 826-828). He testified that he had advised Mitchell, Burton and Moore on October 31 that "we were submitting a joint venture purchase order for this material" (RT 796). According to Orr, "then Mr. Mitchell and Mr. Moore agreed to accept the purchase order of the Joint Venture" (RT 796, 814). He identified Jt. Exs. 9 and 10 as "the two purchase orders that were prepared as a result of the negotiations that we had" (RT 798), and that "the data on those came out of" his negotiations (RT 798). He had instructed Frank Wright, IMI's buyer, to send Jt. Exs. 9 and 10 to Mosher (RT 798). He further swore that Jt. Exs. 9 and 10 were prepared upon his "instructions" and that "everything" which Wright had placed upon those documents had "come from" him (RT 807).

Upon cross-examination, Orr swore that Jt. Exs. 9 and 10 conformed in all respects with his understanding of the transaction which he had allegedly negotiated on October 31, 1961 (RT 828). He was then asked to re-examine their contents upon the stand. After such re-examination, he could "see no errors in them" (RT 829).

Orr was thereupon reduced to stuttering incoherence when he was called upon to explain the typed inscription upon each page of Jt. Exs. 9 and 10 which read "Confirming Agreement between Wilson, Mitchell and Burton dated

10/13/61" (RT 829-830), the very words, in substance, which appear upon the letter contract of October 16, 1961. He was equally unable to explain why, if Mosher had agreed on October 31, 1961 to accept the purchase orders of the joint venture, both he and Morton were still endeavoring on November 13, 1961 to induce Mosher to accept "the order strictly on the credit of IMI-Ward for shipment of the material" (Moore RT 358). Orr tried to explain why Jt. Exs. 9 and 10 were purchase order forms of IMI alone, signed only by IMI designated officers, with no mention whatsoever thereon of Ward or the joint venture, by claiming that, at that time, there was no joint venture purchase order forms (RT 856). He was, however, totally unable to offer any reason why the words "and Ward Industries Corporation, a joint venture" were not typed or stamped thereon, as those words had been stamped or typed upon IMI forms and letterheads whenever appropriate for many weeks prior thereto (RT 862-863).¹⁰

Much could be written of Orr's total collapse and the manner in which his testimony was demolished, not only by the internal evidence of the documents themselves, but by indisputable external facts. It is entirely unnecessary. The District Court itself rejected (FF 29; R 1228-1229) Orr's testimony that Mosher had agreed on October 31, 1961 to surrender its contractual rights against Union which had been established by the oral agreement of October 13 and the letter agreement of October 16, and accept, in lieu thereof, the credit of IMI-Ward, a claim which was irrevocably shattered by Mosher's constant affirmation that

¹⁰ Orr's testimony (RT 856) that "later we got a stamp which said Joint Venture" after November 3, 1961, the date of Jt. Exs. 9 and 10, was completely false. As appears from Union Ex. UU, as long prior to November 3 as September 18 (invoices #05125, 05127, 05191, 05193, 05195, etc.), there had been added whenever requisite to the printed inscription "Idaho-Maryland Industries", by stamp, the words "and Ward Industries Corporation, a joint venture".

it had *never* accepted the credit of IMI, Ward or the joint venture of IMI-Ward and had *never* looked to or relied upon any of them for payment from the commencement of its work until its final completion.

From the testimonial discard to which the District Court consigned Orr's discredited testimony, it managed to select, for use only *against Ward*,¹¹ Orr's verbal characterization of Jt. Exs. 9 and 10 as "IMI-Ward" or "joint venture" purchase orders (FF 30, R. 1229). So engrossed were Mosher, Union and, ultimately, the District Court, in attaching the label of "IMI-Ward" or "joint venture" to Jt. Exs. 9 and 10 that each of them totally ignored the following indisputable facts established by incontrovertible documents:

1. The name of the customer upon the plaintiff's shop orders was changed by Mosher itself from Graver to IMI, and *not* from Graver to the joint venture;

2. The name of the customer upon the plaintiff's weekly production records (Pltff. Ex. 34) was changed by Mosher itself from Graver to IMI, and *not* from Graver to the joint venture;

3. Mosher's accounts receivable ledger for both the Tucson and Vandenberg jobs (Jt. Exs. 17 and 18) show, as Mosher's debtor, only "Idaho-Maryland Industries Inc." and *not* the joint venture;

4. Every invoice issued by Mosher for the Tucson and Vandenberg jobs (Jt. Ex. 14) show that the materials were sold only to IMI and *not* the joint venture, with the addi-

¹¹ Orr's testimony *against Mosher*, that it had agreed on October 31 to accept the credit of IMI-Ward in lieu of the credit of Union, was rejected by the District Court as a complete fabrication from start to finish (FF 29, R. 1228-1229).

tional typed inscription thereon: "Customer Graver Tank Manufacturing Co." under the printed heading "Shipped to and Destination"; and

5. On February 20, 1962, after IMI's bankruptcy, Moore, as Secretary-Treasurer of Mosher, wrote to Fluor, advising Fluor that it furnished "Idaho-Maryland Industries Inc.", *not* the joint venture, "approximately \$296,000.00 of fabricated steel and for fabricating steel furnished for Graver Tank." (Jt. Ex. 81)

C. *Jt. Exs. 9 and 10 Did Not Create an Agreement Between Mosher and IMI-Ward*

In Conclusion of Law #4, the District Court declared that, in performing its work for the Tucson and Vandenberg jobs, Mosher "did not deal with, nor rely upon the credit of, IMI individually, but Mosher performed pursuant to its agreement with IMI-Ward" (R 1238).

Thus, the District Court glided from the fact that Mosher did not rely upon the credit of IMI individually (as it did not rely upon the credit of Ward individually, or the credit of the joint venture of IMI-Ward) to the mystifying *non sequitur* that Mosher performed "pursuant to its agreement with IMI-Ward". Nowhere in its findings does the District Court advert to any testimonial or documentary support for its oracular pronouncement that an "agreement" arose between Mosher and IMI-Ward, a pronouncement which violates every principle in the Anglo-American law of contracts by which the formation or existence of a bilateral contract is determined. Every fact in this record, including the dispositive admissions of Mosher itself, establishes beyond the possibility of rational dispute that Mosher never accepted the credit of IMI, Ward or IMI-Ward either *in lieu of* or *in addition to* the credit of Union. Equally established by Mosher's own admissions

is the fact that Mosher never relied upon or looked to IMI, Ward or IMI-Ward for payment. The genesis of the alleged "agreement" between Mosher and IMI-Ward tangentially invoked by the District Court in CL 4 exists solely in the fiat of the Court itself.¹²

As will more fully appear in our discussion of the applicable law, the transfer of the customer's name upon Mosher's records for the convenience of IMI's bookkeeping was never the subject of any bargain by Mosher. Mosher's performance was never induced by that transfer. Its acquiescence in that respect was a mere accommodation which it was willing to effect if, and only if, Union reaffirmed its unconditional promise to pay. *Union's promise to pay was the sole inducement and consideration for Mosher's promise to perform.* To hold, as the District Court has held, that the transfer of the customer's name upon its books induced and was the consideration for Mosher's promise to perform is to disregard the record in this case in its entirety.

Specification of Errors

1. The District Court erred in refusing to find, in accordance with the evidence of Mosher's own witnesses and records, that there was never any agreement between Mosher and IMI, Ward or IMI-Ward; that Mosher had explicitly refused to accept the credit of IMI, Ward, or

¹² In *The Nature of the Judicial Process* (Yale Univ. Press), pp. 106-107, Judge Cardozo wrote with his customary insight and felicity of phrase:

"A judicial judgment, says Stammler, 'should be a judgment of objective right, and no subjective and free opinion; a verdict and not a mere personal fiat. Evil stands the case when it is to be said of a judicial decree as the saying goes in the play of the 'Two Gentlemen of Verona' (Act I, sc. ii):

'I have no other but a woman's reason;
I think him so, because I think him so.'"

IMI-Ward; and that it had never looked to, or relied upon IMI, Ward or IMI-Ward for payment from the commencement of this work until its completion.

2. The District Court erred in refusing to find, in accordance with incontrovertible evidence, that a promise to perform, or the performance of an act which one is already legally bound to perform, cannot constitute a valid or sufficient consideration for the subsequent promise of another to pay.

3. The District Court erred in refusing to find that the extension of credit or delivery of goods to an individual member of a known partnership or joint venture does not create a partnership or joint venture obligation or debt.

ARGUMENT

POINT I

No contract of any kind was ever formed between Mosher and IMI-Ward. Mosher never bargained for, but on the contrary, explicitly refused to accept, the credit of IMI, Ward, or IMI-Ward and never looked to or relied upon IMI, Ward or IMI-Ward for payment.

No principle of Anglo-American contract law has been more firmly established than the doctrine that a bargain is an indispensable prerequisite to the existence or formation of a bilateral contract. Thus, a party can never recover upon the alleged promise of another if that promise did not induce his action and was not the subject matter of his bargain; if, in short, he did not act or rely upon the promise, or look to the promisor for payment.

A recent decision emphasizing these fundamental precepts was rendered by this Court in *Colorado National*

Bank of Denver v. Boehm, 286 F. (2d) 494 (1961). In that case, the Bank brought an action against Boehm to recover an amount allegedly due upon a promissory note. Boehm denied any liability upon the ground that he "received no consideration for executing the note." The note, in the sum of \$25,000, had been made payable to one Mrs. Sears, and had been signed by Boehm and Mrs. Sear's son, Joseph. It appeared that an agreement had been reached between Mrs. Sears, her son Joseph and Boehm that Mrs. Sears would finance Joseph in the operation of a milling business, using Boehm's alfalfa mill as a base of operation. Mrs. Sears undertook to furnish Joseph with the sum of \$40,000, \$15,000 of which was paid to Boehm for a lease of the alfalfa mill to Joseph, with an option to purchase, and \$25,000 of which was to be used by Joseph as operating capital. The sum of \$25,000 was represented by the promissory note signed by Joseph and Boehm.

Boehm claimed that Mrs. Sears had told him that he would not be held liable upon the note and that he would never be called upon to pay it. The Bank contended that there was ample consideration for Boehm's execution of the promissory note in the form of both a detriment to the promisee and a benefit to the promisor; the detriment to the promisee being the sum of \$25,000 paid by Mrs. Sears under the note and the benefit to Boehm being the \$15,000 he received for the lease, and the fact that the remaining \$25,000 was to be used in the operation of his mill, from which he would receive a rental.

In affirming a dismissal of the complaint and rejecting the Bank's argument that the alleged existence of a detriment to the promisee and a benefit to the promisor created a valid and subsisting contract obligation, this Court, per Orr, J., underscored the immutable principle in the law of contracts that the consideration must be "*bargained for*—

it must be the thing that the parties agree will be given in exchange for the promise."

This Court thereupon ruled in language directly applicable to the instant case:

"Such evidence does not contradict or vary the terms of the note but impeaches the consideration necessary to make the note enforceable. *Dixon v. Miller*, *supra*. Appellant contends that this rule does not apply here because there was consideration for the note in the form of both detriment to the promisee and benefit to the promisor; the alleged detriment to Mrs. Sears was the \$25,000 she paid out in connection with the note, and the benefit to appellee was the \$15,000 he received for the lease and option under the other half of the transaction and the fact that the \$25,000 was to be used to operate his mill, from which operation he was to receive rent. The error in appellant's argument in this respect is that it fails to recognize the fundamental common law principle that consideration must be *bargained for*—it must be the thing which the parties agree shall be given in exchange for the promise. (Citing, among other authorities, *Fire Insurance Association, Limited v. Wickham*, 1891, 141 U.S. 564, 579; 1 Williston Contracts §§ 100, 102, 102A [3rd ed. 1957]; Restatement, Contracts § 75 and comment b [1932]). The alleged benefits to appellee and detriment to Mrs. Sears could have been consideration for appellee's promise had they been bargained for and intended as such. *However, this was not the case, and therefore said benefits and detriment are not consideration.* 'The mere presence of some incident to a contract which might, under certain circumstances, be upheld as a consideration for a promise, does not necessarily make it the consideration for the promise in that contract.

To give it that effect, it must have been offered by one party, and accepted by the other, as one element of the contract.' (Citing cases). From appellee's conversation with Mrs. Sears it is clear that his signature of the note was given *solely* in exchange for her promise that he would not be held liable on the note; hence there was no consideration which could make this note enforceable against appellee." (Italics ours, except for the words "bargained for" underscored by the Court)

In its opinion, this Court cited the United States Supreme Court's decision in *Fire Insurance Association v. Wickham*, 141 U. S. 564 (1891), where the Court had formulated the applicable principles as follows (pp. 579 et seq.):

"That prepayment of part of a claim may be a good consideration for the release of the residue is not disputed; but it is subject to the qualification that nothing can be treated as a consideration that is not intended as such by the parties. Thus in *Philpot v. Gruninger*, 14 Wall. 570, 577, it is stated that '*nothing is consideration that is not regarded as such by both parties.*' To constitute a valid agreement there must be a meeting of minds upon every feature and element of such agreement, of which the consideration is one. The mere presence of some incident to a contract which might under certain circumstances be upheld as a consideration for a promise, does not necessarily make it the consideration for the promise in that contract. To give it that effect it must have been offered by one party and accepted by the other as one element of the contract. In *Kilpatrick v. Muirhead*, 16 Penn. St. 117, 126, it was said that 'consideration, like every other part of a contract, must be the result of agreement. The parties must understand and be influenced to the particular

action by something of value or convenience and inconvenience recognized by all of them as the moving cause. *That which is a mere fortuitous result flowing accidentally from an arrangement, but in no degree prompting the actors to it, is not to be esteemed a legal consideration.*' See also 1 Addison on Contracts, 15; Ellis v. Clark, 110 Mass. 389." * * * (Italics ours)

In *Wisconsin and Michigan Railway Co. v. Powers*, 191 U.S. 379, 386 (1903), Mr. Justice Holmes had summarized the applicable rules of law in the following classic language:

"In the case at bar, of course the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. *But the other elements are that the promise and the detriment are the conventional inducements each for the other.* No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. *It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting.*" * * * (Italics ours)

The foregoing doctrines have been universally applied. In *Du Pont De Nemours & Co. v. Claiborne-Reno Co.*, 64 F. (2d) 224, 235 (1933), the Eighth Circuit, per Sanborn, Jr., quoted with approval the crystallization of those principles by the Restatement of the Law of Contracts as follows:

* * * "The fact that the promisee relies on the promise to his injury, or the promisor gains some advantage therefrom, does not establish consideration *without the*

element of bargain or agreed exchange.' Restatement of the Law of Contracts of the American Law Institute, vol. 1, § 75, Comment c." (Italics ours)

In *Dougherty v. Salt*, 237 N.Y. 200, the issue before the New York Court of Appeals was whether there was any consideration for a \$3000 promissory note delivered by an aunt to an 8 year old nephew upon a printed form which recited the words "value received." In reversing the judgment of the Court below, and dismissing the complaint, Judge Cardozo held (pp. 202-203):

"... The aunt was not paying a debt. She was conferring a bounty (*Fink v. Cox*, 18 Johns 145). The promise was neither offered nor accepted with any other purpose. 'Nothing is consideration that is not regarded as such by both parties' (*Philpot v. Gruninger*, 14 Wall. 570, 577; *Fire Ins. Assn. v. Wickham*, 141 U. S. 564, 579; *Wisconsin & M. Ry. Co. v. Powers*, 191 U. S. 379, 386; *DeCicco v. Schweizer*, 221 N. Y. 431, 438). A note so given is not made for 'value received', however its maker may have labeled it. The formula of the printed blank becomes, in the light of the conceded facts, a mere erroneous conclusion, which cannot overcome the inconsistent conclusion of the law (*Blanshan v. Russell*, 32 App. Div. 103; *affd.*, on opinion below, 161 N. Y. 629; *Kramer v. Kramer*, 181 N. Y. 477; *Bruyn v. Russell*, 52 Hun. 17). *The plaintiff, through his own witness, has explained the genesis of the promise, and consideration has been disproved.*" (Italics ours)

Subsequently, in *McGovern v. City of New York*, 234 N.Y. 377, 388-389, the foregoing rules of law were reiterated and reaffirmed by Judge Cardozo in the following language:

“ . . . ‘Nothing is consideration’, it has been held, ‘that is not regarded as such by both parties’ (Philpot v. Gruninger, 14 Wall. 570, 577; Fire Ins. Assn. v. Wickham, 141 U. S. 564, 579; DeCicco v. Schweizer, *supra*, at p. 438). The fortuitous presence in a transaction of some possibility of detriment, latent but unthought of, is not enough (Fire Ins. Assn. v. Wickham, *supra*). *Promisor and promisee must have dealt with it as the inducement to the promise* (Holmes Common Law, p. 292; Wisconsin & Mich. Ry. Co. v. Powers, 191 U. S. 379, 386; 1 Williston, Contracts, § 139, p. 309). The proposition to modify the contract was not presented by the plaintiffs, nor accepted by the city, as one for the surrender of a veritable opportunity to find cheaper labor elsewhere. It was presented and accepted on the theory that the opportunity did not exist either in expectation or in reality . . .” (Italics ours)

It is utterly beyond dispute that the only consideration for which Mosher had bargained was the unconditional obligation and commitment of Union; that Mosher’s promise to perform was induced solely and only by the reciprocal promise of Union to pay; that Mosher neither sought, bargained for, nor would accept the credit of IMI, Ward or IMI-Ward; and that its acquiescence in the requested change in the name of its customer upon its books was totally and continuously rejected, even as a mere accommodation, until Union’s specific reaffirmation on November 15, 1961 of its promise to pay Mosher direct. An appropriate summary of the determinative principles of law was voiced by the Supreme Judicial Court of Massachusetts in *La Chance v. Rigoli*, 325 Mass. 425, 91 N.E. (2d) 204 (1950) in language directly applicable herein:

“The contracting party must look for payment to the one to whom credit was extended when the work was done, that is, the one who was expected to pay * * *

In view of the incontestable facts established by the record in this case, the rules of law set forth in the decisions hereinabove cited and quoted completely negate the existence of any legally cognizable obligation on the part of Ward to Mosher under Jt. Exs. 9 and 10.

POINT II

A promise to perform, or the performance of an act, which one is already legally bound to perform cannot constitute a valid or sufficient consideration for the subsequent promise of another to pay.

In number 1 of its proposed Conclusions of Law, Mosher claims the existence of a binding "*oral contract* made on October 13, 1961 between Union and the Plaintiff" (R 1406). In number 2 of its proposed Conclusions of Law, it claims that the letter agreement of October 16, 1961 constituted a valid "*interim purchase order*" between the plaintiff and Union (R 1406). In number 4 of its Proposed Conclusions of Law, it claims the existence "of an *oral contract* made on November 15, 1961" by which Union agreed to pay all sums to become due to Mosher for the materials and labor which it furnished for the Tucson and Vandenberg jobs (R 1407).

By its own admissions, Mosher has insisted, again and again, that it became unconditionally obligated, *on three different occasions*, under its contract with Union, to perform the work and furnish the materials for the Tucson and Vandenberg projects and that it became so legally obligated "*prior to, and as a condition of*", its alleged acceptance of Jt. Exs. 9 and 10 (R 1406). In short, it is here contending that the consideration which it purportedly furnished for those documents was precisely what it was already legally bound and obligated to furnish under the

three contracts with Union which it had *previously* consummated.

It is textbook learning that a promise to perform, or the performance of an act, *which one is already legally bound to perform cannot possibly constitute a valid or sufficient consideration for the subsequent promise of another to pay*. The authorities are legion and incontestable.

In *Teele et al v. Mayer*, 173 A. D. 869, the plaintiffs, an accounting firm, entered into a contract evidenced by two letters to render accounting services in the examination of the books of two railway companies operating in western New York. Thereafter, the plaintiffs claimed that the defendant, the President of the two railroads, orally promised to pay them for their work. The plaintiffs then sued the defendant upon his individual promise allegedly made after they had entered into the contract with the railway companies for the performance of their services. In reversing a judgment rendered by the Court below in favor of the plaintiff, and dismissing the complaint, the Appellate Division of the New York Supreme Court ruled as follows (pp. 871-872):

“The only consideration that is urged as sufficient to sustain his personal undertaking to pay for plaintiffs’ services is the suggestion that plaintiffs went on and completed the work in reliance upon his promise, whereas, but for that, they would have discontinued their work. This suggestion loses sight of the fact that, when the alleged promise was made, *the plaintiffs had already undertaken by contract with the railway companies to do this very work, and that they did nothing and no more after defendant’s promise than they had already agreed to do.* * * * *Here was a complete and binding contract between plaintiffs and the railway companies which plaintiffs were bound to per-*

*form, so that it is entirely accurate to say, that plaintiffs did no more in reliance upon defendant's promise than they were already bound to do by their contract with the railway companies. * * ** If then plaintiffs agreed to do no more, and in fact did no more than their contract with the railway companies obligated them to do, their continuance and completion of the work afforded no consideration for defendant's alleged promise. Nothing is better settled than that the doing of an act which a party is under a legal obligation to perform cannot constitute a consideration for a new contract." (Italics ours)

The rules of law set forth by the Appellate Division in the foregoing case have been repeatedly reiterated and applied by the New York Courts. In *Arend v. Smith*, 151 N. Y. 502, the New York Court of Appeals declared at page 505:

"No consideration can arise simply from the method of doing an act which it is one's duty to do. The subject does not admit of extended discussion, for it has been a principle of the common law from the earliest times that a promise without a legal consideration as an equivalent cannot be enforced, and it is well settled that 'the performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract'. (*Robinson v. Jewett*, 116 N. Y. 40.)".

The principles set forth in the foregoing decisions have been universally applied. In *Halstead Lumber Co. v. Hartford Accident & Indemnity Co.*, 38 Ariz. 228, 298 Pac. 925, the Supreme Court of Arizona held:

"A promise to do something which a party is already legally obliged to do is no consideration for a contract."

In *Konigsberger v. Wingate*, 31 Tex. 42, 98 Am. Dec. 512, the Texas Court ruled as follows at page 513:

“The testimony as given, if added to the note, as we are bound to consider it, would make the note read, Payable as soon as I have complied with the contract that I have made and am legally bound to perform, it being understood that the only consideration of this note is to cause me to do what I am already bound to do.

We consider it unnecessary to dwell on the subject. It is perfectly obvious that there was no legal consideration for the note.”

In *Marinovich v. Kilburn*, 153 Cal. 638, 96 Pac. 303, the California Court held as follows at page 304:

“The principal contention of the plaintiff, upon this appeal, is that the fact that the plaintiff was unwilling to perform his contract to pay to the company the balance of his subscription, and was refusing to do so, and the fact that he agreed to, and did, perform it because of the agreement sued on, constituted a sufficient consideration for the agreement on the part of Kilburn to buy the stock and pay him \$3,000.00 therefor. We think this proposition is not tenable. This court has said: ‘It is well settled that neither a promise to perform a duty, nor the performance of a duty, constitutes a consideration of a contract.’ *Sullivan v. Sullivan*, 99 Cal. 193, 33 Pac. 862. In *Ellison v. Jackson Water Company et al.*, 12 Cal. 553, Ellison was bound by contract to do certain work for the Jackson Water Company. Thereafter one Bayerque, a defendant in the action, promised that, if Ellison would proceed with the work he (Bayerque) would pay to Ellison the amount due under the contract. The court says: “A

promise to *Bayerque* to perform this contract could furnish no consideration for a promise *by him*. The consideration of the original contract could not attach to the subsequent promise.' (The emphasis is ours.)"

In *Mason Construction Co., et al. v. Kosmos Portland Cement Co.*, 248 Ky. 782, 59 S.W. (2d) 1016, the Kentucky Court of Appeals formulated the applicable doctrines as follows:

"There was no consideration for this bond as between the Mason Construction Company and the Kosmos Portland Cement Company. *The material had not been furnished or the credit extended to Bell on the faith of this instrument.* *Standard Oil Co. v. National Surety Co.*, 234 Ky. 764, 29 S. W. (2d) 29.

* * * It is a settled principle of law that a promise to do what the promisor is already bound to do cannot be a consideration for a contract. *Wallace v. Cook*, 190 Ky. 262, 227 S. W. 279. Where one owes a duty to another, a bond executed for the purpose of inducing him to perform that duty is without consideration—a requisite element of every contract." (Italics ours)

In *Watson v. American Creosote Works*, 184 Okla. 13, 84 Pac. (2d) 431, the Supreme Court of Oklahoma applied the rules as follows in language directly applicable to the instant case:

"The defendant contends that he made an oral contract with the plaintiff under which the plaintiff agreed with the defendant that plaintiff would deliver on or before June 5, 1929, the bridge building material included in the contract between the plaintiff and Wise County, Texas. In other words, the defendant contends that the plaintiff promised to carry out the terms

of a contract made between the plaintiff and Wise County, Texas. This is an alleged breach of an oral contract between the defendant and the plaintiff. That is to say, the plaintiff promised to carry out the terms of a contract with other parties, while the defendant did not promise to do anything. Whatever obligation to the defendant that might have existed on the part of plaintiff to carry out the oral agreement, relative to the delivery of the bridge material, there still was neither mutuality of obligation nor consideration to support such a contract. The obligation to deliver the bridge material at a specified time was an obligation that existed under the contract between the plaintiff and the purchaser, Wise County, Texas."

It is impossible to conceive of a more positive affirmation of a fact than Mosher's testimony that it obtained, upon its unyielding insistence, on three different occasions, an absolute and unconditional obligation from Union to pay, in consideration of its own absolute and unconditional obligation to perform the work and deliver the materials for Tucson and Vandenberg, "prior to, and as a condition of," its change of the customer's name from Graver to IMI upon its records.

It is equally impossible to conceive of a case to which the rules of law set forth above more directly and unqualifiedly apply than the instant one, necessitating without more, a dismissal of Mosher's causes of action against Ward from whom a recovery is sought solely upon the theory that Jt. Exs. 9 and 10 are binding contracts supported by a valid consideration.

POINT III

The extension of credit or the delivery of goods to an individual member of a known partnership or joint venture does not create a partnership or joint venture obligation or debt.

As appears from paragraph 20 of the joint venture agreement between IMI and Ward, "this agreement and the performance thereof and any matters arising out of, under or in connection therewith shall be construed and determined in accordance with the laws of the State of New York." (Jt. Exh. 8)

The foregoing provisions are binding and enforceable, and the law of New York must be applied to the plaintiff's claims against Ward herein. Under New York law, the liability of a joint venturer to a third party is *not* equivalent to the third party liability of a partner. (*Wrenn v. Moskin*, 226 App. Div. 563, 235 N. Y. Supp. 405) In the absence of an agreement, express or implied, there is no authority for one joint venturer to act as the agent of another. (*Wrenn v. Moskin*, supra) A third party will be bound by any provision in the joint venture agreement restricting the authority of one to bind the other. (*Etzkorn v. Levy*, 159 N. Y. Supp. 801)

Under paragraph 2 of the joint venture agreement, it is expressly provided that the "IMI-Ward subcontracts will be entered into in the names of the parties hereto as joint venturers" Under paragraph 7, it is provided that "the work shall primarily be performed by IMI in facilities owned or operated by it." Under paragraph 8, it is agreed that "*The work to be performed by IMI shall be financed solely and completely by IMI* and such work as may be assigned by the Committee to Ward, if any,

shall be solely and completely financed by Ward." Under paragraph 9, it is agreed that "Neither the Committee nor either party hereto shall have the power to borrow moneys or pledge the credit of the other party to this agreement or on their joint credit, except as herein provided."

The applicability of New York law to the case at bar, and the enforceability under New York law of restrictions upon the authority of one joint venturer to bind another to third parties, was confirmed by the Supreme Court of Michigan in *American Mut. L. Ins. Co. v. Hanna, Zabriskie & Daron*, 297 Mich. 599, 298 N. W. 296, where the court ruled at pp. 299-300 as follows:

"The first question raised by the appellant is whether the law of New York or the law of Michigan should be applied. The result would undoubtedly be the same in either jurisdiction, but since the agreement limiting the liability was made in New York and was to have effect there, *it is our view that the law of New York must govern*. The trial court entertained similar views.

In many ways a joint venture is similar to a partnership. However, it must be remembered that they are separate and distinct legal relationships. The law does not attach the same legal consequences to them. Because there is a joint venture, it does not necessarily follow that there is a mutual agency even as to third parties. It was held in *Wrenn v. Moskin*, 226 App. Div. 563, 235 N.Y.S. 405, that there is no authority for one joint adventurer to act as the agent of the other in the absence of an agreement, express or implied.

In the instant case, there was an express agreement made in the State of New York restricting authority

and liability, hence the Hanna Company cannot be said to have given its implied consent and there was no claim that there was any express authority. This case is very similar to that of *Etzkorn v. Levy*, Sup., 159 N.Y.S. 801, where it was held that a third party was bound by an agreement between two joint venturers restricting the authority of either to bind the other within the scope of the business, the relationship being unknown, when the third party executed the contract. *From a reading of the New York cases, it becomes clear that the restrictive agreement is valid * * ** (Italics ours).

Even if we assume, *arguendo*, that the liability of joint venturers to third parties under New York law is precisely the same as the liability of partners, the plaintiff could not possibly sustain any claim herein against Ward. From the inception of this lawsuit, Mosher has proceeded upon the supposition that, where a partnership is known, the extension of credit or delivery of goods to an individual partner in his individual name automatically creates a partnership obligation or debt. That hypothesis is completely erroneous and fallacious. The law is directly to the contrary.

The authorities have unanimously and universally ruled that, under such circumstances, the partnership is not liable for the indebtedness of an individual partner, even though the partnership may have received the benefit of the credit or delivery of goods. The classic authority in the United States is the decision of the New York Court of Appeals in the famous and oft-cited case of *National Bank of Salem v. Thomas*, 47 N.Y. 15, where the court formulated and applied the applicable rules of law as follows at pp. 19 et seq.:

“This is not an attempt to charge a dormant partner. It is probably true that a dormant partner may be charged upon an express contract made by the active and known partners in the name in which the co-partnership business is ordinarily done, as well as upon the implied contracts of the firm. In either case the contract is in the name by which the dormant partner is represented, and in which he has authorized business to be transacted for his benefit. A dormant partner is one who takes no part in the business, and whose connection with the business is unknown. Both secrecy and inactivity are implied by the word. (Parsons on Part., 33, per Baldwin, J.; *Winship v. Bank of U.S.*, 5 Pet. 573; *North v. Bloss*, 30 N.Y. 374.) The defendant was neither inactive nor was his connection with the business a secret. *The partnership so far as appears, was open and public.* But the difficulty with the plaintiff’s case is, that the contract was not that of the firm, but of individual members of the firm. *The money was loaned by the plaintiff on the individual credit of Hoag and Batty, and the fact that it was applied to the payment of partnership debts, does not constitute the lender a creditor of the firm*” (Italics ours).

The rules of law formulated by the court in the *Salem* case *supra*, are universally applied. In 40 Am. Jur. §160, p. 243, they are set forth as follows:

“A partner is liable alone on all contracts made by him on his own exclusive credit. If money is borrowed or goods are bought or any other contract is made by one partner upon his own exclusive credit, he alone is liable therefor, and the partnership, although the money, property, or other contract is for its proper

use and benefit or is applied thereto, will in no manner be liable therefor."

The decisions in the State of Texas, Mosher's home State, are in complete accord with the foregoing principles. In *First State Bank of Riesel v. Dyer*, 151 Tex. 650, 254 S. W. (2nd) 92, the plaintiff bank brought an action against Dyer and Woodside to recover upon a note signed by Woodside and his wife, but not purporting to be the obligation of Waco Gibson Tractor Sales, a partnership consisting of Dyer and Woodside. The trial court dismissed the action against Dyer. Upon appeal, the Supreme Court of Texas affirmed the dismissal. After quoting from the sections of Amer. Jur. cited above, the court declared (pp. 653-654):

"There is no evidence to show liability of Dyer to the Bank. The Bank knew that Dyer was a partner in Waco Gibson Tractor Sales—according to the most favorable testimony to the Bank—but knowing this fact, made the loans to Clinton Woodside and Edna Woodside, and never asked or demanded that the firm name be signed, or that Dyer sign any of the notes given for the loans involved in this suit. *The Bank's liability ledger sheet showed liability was carried only in the name of Clinton Woodside.*" (Italics ours.)

Recently, in *Pair v. Caraway Drilling Co.*, 250 S.W. (2nd) 292, the Texas Court of Civil Appeals ruled as follows (p. 295):

"We further conclude that the record conclusively shows that Caraway, in drilling the hole and setting the oil string, *contracted solely with Schkade and extended credit to him alone.* For this reason, if no other existed, the judgment against Pair for \$3,892.85, for

drilling the hole at \$2.65 per foot, cannot be sustained.”
(Italics ours)

The law of California is precisely the same. In *Bratton & Moretti v. Finerman & Son*, 171 Cal. App. (2nd) 430, 340 Pac. (2nd) 673, the California Court of Appeal ruled as follows (p. 675):

“The trial court was justified in finding that the fertilizer delivered by the plaintiffs was sold and delivered upon the individual credit of the defendant Finerman and not on the credit of a partnership or joint venture. *Shapiro v. Greenberg*, 94 Cal. App. 241, 270 p. 1008. Even a joint venturer or partner may contract on his own account and may make himself individually liable if the seller chooses to accept such individual liability and in reliance thereon delivers goods.”

The foregoing rules of law have been enunciated and applied by the courts of every other jurisdiction to which the issue has been presented. In *Alaska Pacific Salmon Co. v. Matthewson et al.*, 3 Wash. (2nd) 560, 101 Pac. (2nd) 606, a joint venture existed between Matthewson, doing business under the name of the Matthewson Shipping Company, and two individuals, Tebb and Anderson. Matthewson contracted to purchase certain stock in a corporation from the plaintiff. Subsequently, he defaulted in payment of the balance due for the purchase price of the stock. The plaintiff brought an action against Matthewson, Tebb and Anderson, contending that the three persons named were partners in the purchase of the stock. The court ruled that, “without so deciding, it will be assumed, only for the purpose of this decision, that they were partners, and that they would be liable as such.”

In dismissing the plaintiff's complaint against Anderson (Tebb having defaulted in appearing), the court ruled that

the other members of the joint venture could not be held liable for the purchase of the stock under the contract signed by the Matthewson Shipping Company alone, the plaintiff having known at that time that Tebb and Anderson were joint venturers with Matthewson. The Supreme Court of the State of Washington held as follows, at page 607:

“As already stated, the contract for the purchase was signed only by Matthewson Shipping Company. At that time, the Court found, and the evidence shows, the salmon company knew that Tebb and Anderson were financially interested with Matthewson in the purchase of the stock. It is a well known rule that, where a partnership business exists, each partner is a principal, as well as an agent. In other words, each partner is an agent of the other partners in the transaction of the partnership business. 47 C.J., p. 643; 1 Rowley, *Modern Law of Partnership*, 485, §411. *Where, however, the partners are disclosed and known to a party contracting, and the contract is only signed by one of the partners who contracts on his own behalf, the other partners are not bound thereby.* From what has been said it follows that neither Tebb nor Anderson was obligated under the contract of purchase.” (Italics ours)

In *Queen City Petroleum Products Co. v. Norwood-Hyde Bank and Trust Company*, 49 Ohio App. 397, 197 N.E. 357, one Donnelly borrowed certain moneys from the plaintiff bank, advising the bank that he was a member of a firm which had a contract to do certain work which would net the firm a large sum of money. Donnelly further stated that the money loaned would be used by the partnership for the prosecution of the work, and the money so borrowed was in fact so used. When Donnelly defaulted in the pay-

ment of the loan, the bank attempted to recover the balance due from the partnership. In dismissing the claim, the Ohio Court of Appeals ruled as follows at page 358 et seq.:

“That the funds borrowed by the individual partner were used for, and in the business of, the partnership, is not in itself sufficient to prove a partnership obligation. *Peterson v. Roach*, 32 Ohio St. 374, 30 Am. Rep. 607, the second paragraph of the syllabus reads: ‘Where a partner borrows money on the credit of his individual note, which is signed also by a surety, such borrowing does not create a partnership debt, though the money be applied to partnership purposes; and the principal of such surety is the individual partner, with whom he joins in the execution of the note, and not the partners generally.’”

In *Southern Surety Co. v. Plott*, 28 Fed. (2nd) 698, the Circuit Court of Appeals, Fourth Circuit, held as follows at page 700:

“Where one, with knowledge of a partnership, elects to contract with an individual member of the partnership upon that member’s exclusive credit, even though the contract is for the benefit of the partnership, the member contracted with and he alone is liable under the contract.”

Under the authorities cited and quoted above, it is indisputably clear that, *if* the plaintiff had extended any credit whatsoever to IMI, any liability resulting therefrom was solely an individual indebtedness of IMI, and not an obligation of Ward or the joint venture. The following summary of the documentary evidence in this regard is conclusive:

(1) The so-called purchase orders of November 3, 1961 were issued by IMI alone, upon the purchase order forms of IMI, and were all signed by Frank J. Wright as Buyer for IMI;

(2) The name of the customer upon Mosher's shop orders was changed by Mosher itself from Graver to IMI;

(3) The name of the customer upon Mosher's weekly production records was changed by Mosher itself from Graver to IMI;

(4) Mosher's accounts receivable ledgers for both the Tucson and Vandenberg jobs (Jt. Exs. 17 and 18) show IMI as Mosher's sole debtor;

(5) Every invoice issued by Mosher for the Tucson and Vandenberg projects (Jt. Ex. 14) show IMI as Mosher's sole debtor;

(6) Both the Tucson and Vandenberg projects were invoiced by Mosher solely and only to IMI;

(7) On February 20, 1962, after IMI's bankruptcy, the plaintiff wrote to Fluor, advising Fluor that it was asserting a claim against IMI for the work which it had performed on the Tucson job (Jt. Ex. 81); and

(8) In the IMI bankruptcy, the plaintiff filed a proof of claim against IMI individually as an individual creditor of IMI and procured a final judgment against IMI individually, upon the claim that the purchase order forms of November 3, 1961 created an individual obligation of IMI entitling the plaintiff to share in the individual assets of IMI equally with all other individual creditors of IMI. The plaintiff has received, in full, the benefits provided by that judgment (R 663-668).

In *Eads Hide & Wool Company v. Merrill*, 252 Fed. (2d) 80, the Tenth Circuit held that a creditor who had filed

his claim in the individual bankruptcy of Chapman as an individual creditor of the bankrupt and shared *pro rata* in the individual bankrupt's assets, was judicially estopped from later asserting that the obligation was, in fact, a partnership obligation for which Merrill, the alleged non-bankrupt partner, could be held responsible in an independent action subsequently instituted against him. In its comprehensive opinion, the Tenth Circuit declared:

“Appellant has formerly asserted a right to share in the individual estate of a bankrupt partner on an equal basis with other individual creditors. He has acquiesced in the amounts settled between Merrill and the trustee in bankruptcy as conveyances made in preference to Merrill as a creditor of Chapman. * * * Having thus recognized Merrill as a creditor of the Chapman estate and having thus declared itself to be a creditor of Chapman individually through its acceptance of dividends to the detriment of other general creditors, it must be held to be estopped to now claim that the obligation due it was a partnership obligation.”

Under the foregoing authorities, it is indisputably clear that the final judgment procured by Mosher against IMI in the IMI bankruptcy proceeding constituted an irrevocable determination that Jt. Exs. 9 and 10, *if they created any obligation at all*, created only an individual obligation of IMI, and not an obligation of the joint venture.

The plaintiff has shared in the individual assets of IMI, as an individual creditor of IMI, *pro rata* with all other individual creditors of IMI, upon an obligation allegedly created by Jt. Exs. 9 and 10 which it then claimed to be the separate, individual and independent obligation of IMI. It cannot now, in this action, escape the consequences of the position which it then took, and the judgment which

it obtained in the IMI bankruptcy proceedings, by advancing the completely contrary argument that those documents did not create an individual obligation of IMI, but rather a joint venture obligation, and that IMI was, in any event, liable for that indebtedness as a member of the joint venture. The liability imposed upon IMI as a joint venturer, under partnership law, could not possibly have justified the individual recovery obtained by the plaintiff as an individual creditor of IMI in IMI's individual bankruptcy proceeding. (*Schall v. Camors*, 251 U.S. 239, 255, aff'g 250 Fed. 6; *In re Hacker & Co.*, 225 Fed. 869; *Cutler Hardware Co. v. Hacker*, 8th Circ., 238 Fed. 146).

By procuring a final judgment in the bankruptcy proceeding and availing itself in full of the benefits provided therein, the plaintiff irrevocably elected to treat the indebtedness for its deliveries to the Tucson and Vandenberg jobs as a separate and independent indebtedness of IMI, and not as an indebtedness of the joint venture. Its present position constitutes a fraud upon all of the individual creditors of IMI whose claims against IMI individually were diminished by the distribution made to the plaintiff as an individual creditor of IMI. (*In re Hurley Mercantile Co.*, 9th Circ., 56 Fed. (2d) 1023).

CONCLUSION

The juridically dispositive facts established by the record upon this appeal are indisputable. The rules of law applicable thereto constitute the very foundation of contract law upon which our existing structure of commerce and trade has been reared. Those rules of law are expressed, in capsule form, in the following excerpts from leading decisions across the land:

“The foregoing evidence to my mind establishes conclusively that plaintiff carried these shipments *on the sole and exclusive credit* of Freight Cargo and *never expected or intended to collect* from Bank Note” (*Flying Tiger Line Inc. v. American Bank Note Co.*, 198 Misc. 483, 487, 96 N. Y. Supp. (2d) 618, 620-622). “The evidence as to Hayes Manufacturing Co. indicates that all negotiations for the sale of the involved chairs were transacted with the agent of Great Western Hotels Inc. *and that Hayes looked to it alone for payment*” (*Borgonovo v. Henderson*, 182 Cal. App. [2nd] 220). “The evidence, however, conclusively shows *the credit was extended to Krueger, and him only*, upon his own solicitation and representations” (*Young’s Market Co. v. Laue*, 60 Ariz. 512, 141 Pac. [2nd] 522, 523).

For all of the reasons hereinbefore set forth, it is respectfully submitted that the judgment entered by the District Court in favor of Mosher against Ward be reversed

and Mosher's cause of action against Ward dismissed upon the merits.

Respectfully submitted,

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JOSEPH LOTTERMAN

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Of Counsel

Certificate of Compliance

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH LOTTERMAN
Attorney

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

THE FLUOR CORPORATION,
LTD., et als

Appellants

vs.

UNITED STATES OF AMERICA
for the use and benefit of
MOSHER STEEL COMPANY and
MOSHER STEEL COMPANY,

Appellees

No. 21307
No. 21307A
No. 21307B
No. 21307C

BRIEF OF APPELLANTS

THE FLUOR CORPORATION LTD., FEDERAL
INSURANCE COMPANY, VIGILANT INSURANCE
COMPANY, INSURANCE COMPANY OF NORTH
AMERICA, GENERAL INSURANCE COMPANY OF
AMERICA, SEABOARD SURETY COMPANY,
AMERICAN RE-INSURANCE COMPANY, EMPLOY-
ERS REINSURANCE CORPORATION and GEN-
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**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THE FLUOR CORPORATION,
LTD., et als

Appellants

vs.

UNITED STATES OF AMERICA
for the use and benefit of
MOSHER STEEL COMPANY and
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Appellees

**No. 21307
No. 21307A
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BRIEF OF APPELLANTS

THE FLUOR CORPORATION LTD., FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, GENERAL INSURANCE COMPANY OF AMERICA, SEABOARD SURETY COMPANY, AMERICAN RE-INSURANCE COMPANY, EMPLOYERS REINSURANCE CORPORATION and GENERAL REINSURANCE CORPOATION

I.

JURISDICTIONAL STATEMENT

In the interest of brevity, these appellants adopt the statements contained in the brief of Appellant Union Tank Car Company (Union) under this heading, with the following supplement:

The only count of the amended complaint (R. 268) which involves these appellants is Count I, brought under the Miller Act (40 U.S.C. § 270). Judgment was rendered in favor of the use plaintiff on this count May 24, 1966, in the sum of \$246,165.96 against Fluor and the Sureties, which filed notice of appeal July 18, 1966.

II.

STATEMENT OF THE CASE

Fluor and the Sureties adopt the statement of the case contained in the brief of Appellant Union Tank Car Company with the following supplement:

Count I of the complaint alleges that Fluor Corporation, Ltd. (Fluor) entered into a written contract dated May 29, 1961, with the United States of America whereby Fluor agreed to construct certain Titan II missile launch facilities near Davis-Monthan Air Force Base, Tucson, Arizona; that Fluor as principal and the Sureties above named entered into a bond under the Miller Act; that Appellant Union, and Idaho-Maryland Industries, Inc., and Ward Industries Corporation, a joint venture (IMI-Ward)¹ were sub-contractors of Fluor.

Count I further alleges (R. 270) that the use plaintiff, Mosher Steel Company (Mosher) "at the special instance and request of Union . . ." and, in addition, at the special instance and request of IMI-Ward had "furnished, fabricated and delivered certain steel which was incorporated" in the missile launch facilities,

¹ Idaho-Maryland Industries (IMI) having gone into bankruptcy, was not a party to this action for reasons which will be made clear later in the briefs. Union's contract was carried out by its Graver Tank division and the terms "Union" and "Graver" are interchangeable.

and had failed to pay Mosher \$298,336.50, being the reasonable value of the material fabricated.

The amended answer of Fluor and the Sureties (R. 426) admitted that the use plaintiff had furnished fabricated material to IMI-Ward, denied that IMI-Ward was a subcontractor of Fluor, alleging that IMI-Ward was a second-tier subcontractor, and denied that Flour had required the materials to be furnished or that such materials were furnished with Fluor's knowledge, consent or approval.

All other counts of the amended complaint involved Union or Ward, but not Fluor or the Sureties.

Against Mosher's claim of \$298,336.50, it developed at the trial that Mosher had received IMI stock out of the IMI bankruptcy. Mosher finally stipulated (R.T. 681) that this stock had a value of \$52,170.62, which the court credited to the defendants in its judgment.

On May 24, 1966, judgment was rendered against Fluor and the Sureties for \$246,165.96 (R. 1241).

The judgments against the various parties were arrived at by the Court as follows (R. 1239):

Total Claim of Mosher	\$321,053.54
Credit IMI stock received by Mosher:	52,170.62
Judgment against Union and Ward:	268,882.92
Material furnished Vandenberg job:	22,716.96
Judgment against Flour and Sureties on Miller Act bond:	246,165.96

On July 18, 1966, Fluor and the Sureties filed Notice of Appeal from the judgment rendered against them.

III.

SPECIFICATION OF ERROR

THE COURT ERRED, AS A MATTER OF LAW, IN CONCLUDING THAT THE RELATIONSHIP BETWEEN UNION AND MOSHER CONSTITUTED A "DIRECT CONTRACTUAL RELATIONSHIP" WITHIN THE MEANING OF THE MILLER ACT (40 U.S.C. § 270B) AND IN RENDERING JUDGMENT AGAINST FLUOR AS PRIME CONTRACTOR AND AGAINST THE SURETIES UNDER THE MILLER ACT BOND.

IV.

ARGUMENT

Summary

Under the Miller Act, the prime contractor or its surety is not liable to a materialman supplying a sub-subcontractor. The promise which the trial court found had been made by Union to Mosher, to the effect that Union would pay the obligations of IMI-Ward to Mosher, is not the "direct contractual relationship" contemplated by the Miller Act.

The Miller Act provides in part (40 U.S.C. 270b):
". . . any person having direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing said payment bond, shall have a right of action upon said payment bond upon giving written notice to said contractor within 90 days . . ."

Union was the subcontractor for the prime contractor, Fluor, and IMI-Ward, holding a contract under Union, was a *sub*-subcontractor or second-tier subcontractor. Mosher, the plaintiff-appellee here, was a materialman to IMI-Ward. Whether Mosher was a materialman or a *sub-sub*-subcontractor is immaterial, *Elmer v. USF&G Co.* (C.A.5, 1960) 275 F.2d 89. In either event, it is not entitled to recover under the Miller Act. *Clifford F. MacEvoy v. U.S.*, 1944, 322 U.S. 102, 64 S.Ct. 890, 88 L.Ed. 1163.

Nevertheless, the Court found against Fluor and the Sureties and rendered judgment against them in the sum of \$246,165.96. It also found against Ward as a member of IMI-Ward, to which the materials were delivered (Conclusion of Law 4, R. 1238) and against Union (Conclusion of Law 6) on the basis of a telephoned promise made by Page, Union's controller, to Moore, Mosher's credit manager. The facts found by the Court as to this promise are embodied in Findings 35 and 38 (R. 1231, 1232) and are the foundation for the Court's Conclusion of Law No. 3:

"3. Mosher had a direct contractual relationship with Union, and Mosher gave Fluor the written notice required by 40 U.S.C. Section 270b."

This Conclusion is the sole basis for the judgment against these appellants.

Fluor and the Sureties challenge the validity of these findings and conclusions and adopt the arguments contained in Union's brief which point out that the trial court erred in this respect.

It is the position of Fluor and the Sureties that, even assuming that the findings and conclusions have support in the record and the law, the relationship found to exist between Mosher and Union is not the "direct

contractual relationship” contemplated by the Miller Act. In considering this question, it is necessary to ascertain and give effect to the intention and purpose of the legislature in the adoption of this statute. This is the fundamental rule of statutory construction. 82 C.J.S. 560.

“Direct contractual relationship” is not defined in the statute, but it is clear that the act, which is for the protection of materialmen, laborers and subcontractors, was intended to protect persons having contractual relationship with a subcontractor *as a materialman, laborer or sub-subcontractor*. As stated in MacEvoy:

“The proviso of Section 2(a) which had no counterpart in the Heard Act, makes clear that the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who gives the statutory notice of their claims to the prime contractor. To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and the expressed will of the framers of the Act” (88 L.Ed. 1168).

In support of this statement, the Court appends the following footnote:

“A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond. H.Rep.No. 1263 (74th Cong., 1st Sess.), p. 3.”

In essence, the judgment appealed from holds that

Graver had promised Mosher that it would pay IMI-Ward's debt if that joint venture failed to pay.

Whether the resulting legal relationship is suretyship or guaranty, or a contract for the benefit of a third party, or some other type of secondary liability, there is no language in the Miller Act which suggests, implies or infers that the Congress intended that the protection of the Miller Act extends to persons who claim a right to payment *other than as a materialman, laborer, or subcontractor*.

The fact that Mosher is also a materialman is beside the point. The judgment it seeks to sustain is based, not on that fact, but on the fact that the Court found that Graver had promised to pay IMI-Ward's debt to Mosher.

That judgment cannot be sustained against these appellants unless Mosher brings itself within the statute.

As the Supreme Court said in *U.S. ex. rel. Sherman v. Carter*, 1951, 353 U.S. 210, 1 L.Ed.2d 776, 782:

"The Miller Act represents a congressional effort to protect persons supplying labor and material for the construction of federal public buildings in lieu of the protection they might receive under state statutes with respect to the construction of non-federal buildings. The essence of its policy is to provide a surety who, by force of the Act, must make good the obligations of a defaulting contractor to his supplies of labor and material. Thus the Act provides a broad but not unlimited protection."

Exhaustive research has failed to produce a single case in which a court has held that a claimant, too remote in the chain of subcontracts to come under the protection of the Miller Act is entitled to recover against the prime contractor and its sureties because it had received a promise from the subcontractor that it would be paid.

This circuit is committed to an interpretation of the Miller Act and of the MacEvoy decision which in turn is based upon a reasonable interpretation of the statutory language and “congressional intent.” In *Fidelity and Deposit Company of Maryland v. Harris* (1966) 360 F.2d 402, this Court said:

“Recovery under the Miller Act is limited to those who have a direct contractual relationship, express or implied, with the prime contractor or a direct contractual relationship, express or implied, with a subcontractor of the prime contractor.”

* * *

“It is easy to say in the abstract that any subcontractor who actually performs on the project site an integral part of the prime contract is covered by the bond, but the imaginable difficulties in application of the rules are manifold.”

* * *

“In our opinion the virtues of certainty and uniformity in the law advanced by the MacEvoy interpretation of the Miller Act outweigh the alleged benefits of the enlarged scope of bond protection afforded by other interpretations of the act and other interpretations of the language and holding of the MacEvoy case.” (360 F.2d 408, 409).

The Court declined to extend its interpretation stating that it was fearful that such interpretation “would have to destroy the MacEvoy rule as we have adopted it.”

Similar reasoning should apply here. Mosher, the trial court held, was the recipient of Union’s promise, but did not have a direct contractual relationship with Union as a *laborer, materialman or subcontractor*. To hold that *any person* could recover on the Miller Act bond merely because of the existence of a direct contractual relationship with a subcontractor, would completely distort

the intent and purpose of the Congress in adopting the Miller Act. As was said in MacEvoy:

“Congress cannot be presumed, in the absence of express statutory language, to have intended to impose liability on the payment bond in situations where it is difficult or impossible for the prime contractor to protect himself.”

There is no conceivable way in which Fluor could protect itself in the fact situation presented by this case.

We respectfully submit that judgment against Fluor and the Sureties should be reversed.

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FEDERAL INSURANCE COMPANY,
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AMERICAN RE-INSURANCE COMPANY,
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and

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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

By *Harold C. Warnock*
Of Counsel

No. 21307

In the
United States Court of Appeals
FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD., ET AL,
UNION TANK CAR COMPANY
WARD INDUSTRIES CORPORATION,
now known as DRAGOR SHIPPING
CORPORATION,

*Appellants,
Cross-Appellees,*

v.

U.S.A., Ex REL MOSHER STEEL
COMPANY, and
MOSHER STEEL COMPANY,

*Appellee,
Cross-Appellant.*

No. 21307
No. 21307A
No. 21307B
No. 21307C

**REPLY BRIEF OF CROSS-APPELLANT MOSHER
STEEL COMPANY RESPONDING TO
BRIEFS OF CROSS-APPELLEES**

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No. 21307

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Appellee,
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No. 21307
No. 21307A
No. 21307B
No. 21307C

*Upon Appeal From the District Court of
the United States for the District of Arizona*

**CROSS-APPELLANT'S REPLY BRIEF TO ANSWERING
BRIEF OF UNION TANK CAR COMPANY; FLUOR
CORPORATION, LTD.; THE SURETIES AND
WARD INDUSTRIES CORPORATION**

The Cross-Appellant United States of America for the use of Mosher Steel Company, and Mosher Steel Company files its joint answering brief to the reply briefs of all of the defendants, inasmuch as the legal questions and issues presented by them are similar if not identical.

For purposes of reply Cross-Appellant will treat separately those issues presented which are not common to all defendants. Cross-Appellant will reply to Ward's brief first.

REPLY TO WARD'S (DRAGOR SHIPPING CORPORATION) BRIEF

The basic argument of Ward, on page 6 of its Cross-Appellee's Reply Brief, is that until the court resolved the dollar value of the IMI stock received by Mosher, that the amount of Mosher's claim could not possibly be determined and necessarily the *whole* claim was unliquidated until fixed by the court.

Ward also, on page 7 of its brief, states that Mosher's receipt of this stock constituted a payment by IMI on open account of IMI and was not property in which Ward possessed any property interest whatsoever. The answer of Ward (R. 2, p. 329-330) contains no such *affirmative* defense, but Ward's Fourth Defense alleges that the "shares of stock have a very substantial value at the present time, the amount of which must be deducted from the claim asserted by the Plaintiff herein." The same allegations appear in Ward's Fifth Defense.

Thus the court has done what both the Plaintiff and Ward want it to do—gave credit for the IMI stock.

Cross-Appellant submits that the Court has erred, however, in concluding, in Conclusion No. 15 (R. 6, p. 1240), that Mosher's claim is unliquidated until judgment is entered.

Mosher, on pages 4 and 5 of its Opening Cross-Appellant's Brief, has tried to show that the evidence shows the principal amount sued for is *liquidated* even though the value of the IMI stock *credit* was not liquidated until the trial.

In *Wellington G. Betz v. Paul W. Goff*, 5 Ariz. App. 404, 427 P. 2d 538 (1967) the court there stated:

"Secondly, the defendants urge that interest should have been awarded only from the date of judgment, and not from the date the debt fell due. They would have us read A.R.S. § 44-1201, subsec. B, as allowing interest only when agreed to in writing by the debtor. This contention is clearly wrong. A.R.S. § 44-1201, subsec. A permits a rate of 6% per year for 'any legal indebtedness'. The amount of interest awarded, \$1,039.50, as provided in the judgment, is a correct computation of 6% interest on \$3,465.00 from January 31, 1961 (the date the claim accrued) to date of judgment, February 15, 1966. Such indebtedness includes liquidated claims, *which are capable of ascertainment by reference to agreement or simple computation.* Feighner v. Clarke, 2 Ariz. App. 286, 408 P. 2d 219 (1965). The jury had no computation to make; they decided merely that on the facts the plaintiff was entitled to the amount he claimed in his prayer as fixed by agreement of the parties." (Emphasis supplied)

In *Florence E. Feighner, Executrix v. Clarke*, 2 Ariz. App. 286, 408 P. 2d 219 (1965), the Arizona court defines a liquidated claim as follows:

"A 'liquidated claim' has been described as a claim which does 'not require evidence to establish it, but rested upon a mathematical computation', Petersen v. Graham, 7 Wash. 2d 464, 110 P. 2d 149, at 154 (1941)."

Ward has cited *Schwartz v. Schwerin*, 85 Ariz. 242, 336 P. 2d 144 (1959) as standing for the proposition that in-

terest is not allowable on unliquidated claims. In that case Schwartz was suing for attorney's fees not fixed by agreement and on a quantum meruit basis.

The case of *Pacific State Steel Corp. v. Isaacson Iron Works*, 320 F. 2d 645 (9 C.A. 1963) cited by Ward states that under California law goods on open account do not bear interest until settled and the balance ascertained. *Pacific* is not applicable to the case at bar which is not an open account case.

REPLY TO UNION, FLUOR AND SURETIES JOINT ANSWERING BRIEF

Union, Fluor and Sureties have taken an analogous position to Ward on the interest part of this cross-appeal by claiming that until the court found the value, even though stipulated to by all counsel, of the Allied Equities stock, the claim against the defendants was not ascertainable by calculation and therefore unliquidated.

Union, Fluor and the Sureties in their brief assert that *United States Fidelity & Guaranty Co. v. California-Arizona Const. Co., et al.*, 21 Ariz. 172, 186 P. 502, is "dispositive." In this case, Warren Bros., as owner of a patent, filed a claim for services and for royalty payments on bitulithic paving material. In the specifications Warren Bros. was to file an agreement to furnish any contractor desiring to bid for the work all the material at a *definite* and reasonable price per yard. This it did not do. In the claims and in the pleading, recovery was sought on the basis of 25¢ per yard and at the close of the evidence counsel for Warren agreed

that judgment should be rendered for 20¢ per yard, which was the basis of the ruling. In said case, from which Mosher quotes on page 9 of its Opening Cross-Appellant's Brief, the rule in Arizona is that where the amount is definitely fixed by agreement of the parties or capable of ascertainment by mere computation, interest runs from the time the debt became due.

Union, Fluor and the Sureties claim that they, in their Answer, "denied that all or any of the amounts claimed was due and owing the plaintiff." Union has, on page 3 of its brief, set forth its defenses (some of them), and states that "substantial defenses were made by Union's co-defendants."

ALLEGATIONS AND DEFENSES SET FORTH IN ANSWERS

Union, in paragraph 4 of its Fourth Amended Answer (R. 1095) with reference to Count I alleges it had not neglected to pay the plaintiff for said steel and "alleges that this defendant (Union) had no duty or obligation to pay for said steel." In paragraph 6 of its Amended Answer it alleges that all of the materials were delivered to IMI and Ward and in paragraph 5 it admits the allegations of paragraph 9 of the plaintiff's Amended Complaint (R. 271), which alleges that the plaintiff has not been paid any part of \$298,336.58.

Union's Answer to Count II (R. 1096) alleges in paragraph 3 thereof that plaintiff fabricated and delivered the

materials to the Joint Venture which had agreed to pay the plaintiff and which is liable to the plaintiff as alleged in paragraph 4.

Union's Answer to Count IV (R. 1099) answers by alleging that Union was making payments to the assignee of the Joint Venture.

Union's Answer to Count V (R. 1101) and Count VI (R. 1101) realleges its answer to Counts II and IV, and alleges that the Joint Venture assigned all monies owed to the assignee bank.

Ward's Answer (R. 2, p. 327) to Count I alleges that it is not liable (R. 2, p. 328), and admits it has not paid the sum due plaintiff because it is not liable to plaintiff; denies the delivery to Ward or the Joint Venture and alleges delivery to Union.

In answer to Count II (R. 2, p. 328), Ward denies liability.

In answer to Count III (R. 2, p. 329) (direct liability), Ward denies liability.

Ward's separate defenses (R. 2, p. 329)

a. The debt is an individual debt of IMI.

b. That plaintiff received IMI stock which value "must be deducted from the claim asserted by the plaintiff herein."

With respect to Fluor and the Sureties, their Answer (R. 2, p. 426), in essence, specifically denies that the action

is within the purview of the Miller Act, or that the materials, etc. were furnished to its subcontractor.

ARGUMENT AS TO ALL DEFENDANTS

Nowhere in the pleadings is there any allegation of incorrect computation or incorrect invoicing either as to amount or item. Nowhere in the transcript of testimony nor in any of the many exhibits in evidence is there one word of dispute about item or amount. It is inconceivable that now all of the defendants assert that the claims were in dispute. What each defendant has attempted to show at the trial is that someone else besides it is liable. Ward has attempted to shove responsibility on Union or IMI, separately. Union has attempted to shove responsibility on Ward. Fluor has attempted to shove responsibility on Ward.

The court therefore had a task of (1) determining who was liable and (2) imposing liability in the amount and in the manner which had been agreed upon by all parties under the formula fixed by Pl. 1 (RT. 194) and Jt. 9 and 10 and Pl. 6. This amount was calculated by the plaintiff in said invoices and checked out by Union's Tom Harle and IMI-Ward, Joint Venture's Frank Wright, who found nothing that he (Harle) and Tom Wright differed on and Harle agreed with Wright that Mosher's work had been completely and properly performed (RT. 924) and stated it was an excellent job.

Thus the Director of Purchases for Union (Graver Division) and Frank Wright, "purchasing man for the Joint Venture" (RT. 863) not only approved the dollar amounts

of the invoices calculated in accordance with the formula hereinabove mentioned and as set forth in Mosher's Opening Cross-Appellant's Brief (pp. 4-5), but forever put to rest any dispute on amount.

It is therefore urged that the claim of Mosher is within the *Betz v. Goff* and *Feighner v. Clarke, supra*, rule that a liquidated claim is one that is capable of ascertainment by reference to an agreement or a simple computation.

Cross-Appellees, in their briefs, simply toss away the two recent ninth circuit cases cited by Cross-Appellant in its opening brief, the *Macri* and *American Surety* cases, on the ground that these cases involved Alaska and Nevada law. They do not point out wherein the Alaska and Nevada law differs from the Arizona law.

These two important cases simply hold that set-offs and counter-claims will not defeat the right to interest on otherwise liquidated claims. Therefore these cases, unlike most of the other cases cited by Cross-Appellees, are, actually, in point in the instant situation.

Without a doubt, the amount of the Mosher claim was never disputed either in the pleadings or in the testimony, and, but for the benefit derived by the Defendants from the allocation to them of the stipulated value of the IMI stock on reorganization, there would be no question at all but that Mosher would be entitled to interest on the invoiced amounts.

Taking the *Macri* and *American Surety Company* cases as being good law, and it is submitted they are, then the

only ground which Cross-Appellees have for stating that Mosher's claims were unliquidated is simply that the Defendants denied owing the admitted amount, not because there was a dispute as to the amount, but because there was a dispute as to the obligation. If denying obligation for a liquidated claim will render the claim unliquidated, then, a fortiori, no claim collected through suit could qualify as a liquidated claim. This is not the law in any jurisdiction.

CONCLUSION

For the reasons set forth, it is respectfully submitted that Cross-Appellant is entitled to pre-judgment interest and as set forth in the Conclusion on page 12 of its Opening Cross-Appellant's Brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in blue ink, appearing to read "C. G. Purnell", is written over a horizontal dashed line.

Charles G. Purnell, *Attorney*

United States Court of Appeals
FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD., *et al.*,
UNION TANK CAR COMPANY,
WARD INDUSTRIES CORPORATION,

Appellants,
Cross-Appellees,

—v.—

U. S. A., Ex REL MOSHER STEEL COMPANY,
Appellee,
Cross-Appellants.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF ARIZONA

**REPLY BRIEF OF APPELLANT,
WARD INDUSTRIES CORPORATION**

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United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21307, No. 21307A, No. 21307B, No. 21307C

FLUOR CORPORATION, LTD., *et al.*,
UNION TANK CAR COMPANY,
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*Appellants,
Cross-Appellees,*

—v.—

U. S. A., EX REL MOSHER STEEL COMPANY,

*Appellee,
Cross-Appellants.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF ARIZONA

REPLY BRIEF OF APPELLANT, WARD INDUSTRIES CORPORATION

The purpose of this reply brief¹ is twofold: To respond to Mosher's attempt to sustain the palpable invalidity of the judgment rendered in its favor against Ward by the District Court; and to refute Union's frenetic effort to avoid its express promise to pay for Mosher's fabrication and delivery of Union's steel to Union by foisting that obli-

¹ As appellee, Mosher has filed two briefs, one responding to Ward and other responding to Union. Since Mosher's version of the facts is set forth in both of its briefs, references to each will become necessary. Page references to Mosher's brief in response to Ward will be identified as "M-Ward" and page references to Mosher's brief in response to Union will be identified as "M-Union".

gation upon Ward. Each of these positions will be considered in turn:

Ward's Reply to Mosher

Mosher's appellate approach vis-a-vis Ward is thoroughly uninhibited. It ignores the limitations imposed upon a litigant by the contents of the trial record which it characterizes somewhat disdainfully as a "dead record" (M-Ward 2). Its creed is simple: If a legal theory advanced below becomes untenable, discard it. If the evidence contained in the trial record becomes inconvenient, ignore it. If a new theory is needed, invent it. If a new fact is required, create it. What emerges upon this appeal from Mosher's application of its imaginative technique is a brand new posture which not only contradicts Mosher's position against Ward in the court below, but varies from paragraph to paragraph and page to page in its brief upon this appeal. Ward is now presented as a "coincidental" obligor (M-Ward 26), rather than as the "additional" obligor portrayed in the court below (R 1406).

The purpose of Mosher's newly conceived hypothesis is apparent. It is designed to avoid the irrefutable applicability to the "additional" obligor theory of the rule of law that Mosher's alleged promise to perform for IMI-Ward what it had already been bound to perform for Union cannot serve as a legally supportable consideration for the alleged promise of Ward to pay (Ward Opening Br., Point II, 66 et seq.) To sustain its judgment against Ward, premised by the District Court upon its alleged "agreement with IMI-Ward" (CL 4, R 1238), Mosher must establish a bargain which was duly consummated between itself and IMI-Ward; a bargain created by IMI-Ward's offer to Mosher and Mosher's acceptance of that offer, communi-

cated to IMI-Ward, upon all of the terms thereof (Williston on Contracts, 3rd Ed., vol. 1, pp. 211, 230, 235-238).

Try as it will, Mosher has been utterly unable to obscure the juridically dispositive fact which emerges with incandescent clarity from the trial record, the undisputed facts, the incontrovertible evidence and the findings of the District Court itself that *Mosher never accepted the only offer IMI-Ward ever made to Mosher, to wit, that Mosher release Union and substitute the credit of IMI-Ward for the credit of Union*. From Mosher's own version of the facts,² it can be demonstrated with conclusive finality that the parties never agreed upon the same thing at the same time and that no contract of any kind was ever formed between Mosher and IMI-Ward. In the language of this Court's decision in *Merritt-Chapman & Scott v. Gunderson Bros. Engineering Corp.*, 305 F. 2d 659 (1962), at p. 662:

"Offer and acceptance are the tools by which courts and contract negotiators arrive at the illusive contractual concept of 'a meeting of the minds.' *The query is uniformly: Did the parties agree upon the same thing at the same time?* It is our opinion that *in this case they did not.*" (Italics ours)

1. No contract of any kind was ever formed between Mosher and IMI-Ward.

Mosher concedes that the "first appearance at Mosher" of anyone connected with IMI-Ward was the visit of Messrs. Holmes and Orr to the Mosher offices on October 31, 1961

² In the ensuing discussion, we propose to adopt, solely for the purpose of argument, the factually insupportable claim of Mosher that Jt. Exs. 9 and 10 are not purchase orders offered by IMI alone, as we established at pp. 47 *et seq.* of our opening brief, but by IMI-Ward. Even upon that assumption, Mosher's own version of the facts conclusively establishes its continuous refusal to accept the only terms upon which Jt. Exs. 9 and 10 were ever offered to Mosher, i.e., "strictly on the credit of IMI-Ward Industries . . ." (RT 358-359).

(M-Union p. 16). It contends, and the District Court has found, that several weeks prior thereto, Mosher had concluded a valid, binding and subsisting oral contract with Union on October 13, 1961; that the oral contract of October 13, 1961 was embodied in a written letter agreement of October 16, 1961; that both Mosher and Union were unconditionally bound thereby and proceeded at once with their respective performances thereunder; that Mosher relied solely and exclusively upon the credit of Union in the consummation of that contract; and that neither IMI, Ward or IMI-Ward were involved therein in any manner whatsoever. (FF 21-28, R 1227-1228).

During that "first appearance" on October 31, 1961, according to Mosher, Holmes and Orr requested Mosher to "release" Union from its obligations to Mosher (Mitchell, R 50) and accept the credit of IMI-Ward in lieu of and as a substitute for the credit of Graver "due to bookkeeping and other problems" with which Mosher was not concerned (Moore R 43; Dep. vol. 1, 16-17). *That offer was summarily rejected on the spot.* Although Moore had no objection to accommodating the bookkeeping needs of IMI or Union, a matter to which he was completely indifferent (Moore, R 43), *he unconditionally refused to release Union and accept the credit of IMI-Ward as a substitute for the credit of Union,* and refused to permit a change in the name of the customer upon Mosher's books unless Union reaffirmed its obligation to pay Mosher direct.

Prior to October 31, 1961, Moore had concluded that the credit of IMI, Ward and IMI-Ward collectively was totally unacceptable (Moore RT 437-439). After his conversation with Holmes and Orr on October 31, 1961, he checked again to determine whether the credit of IMI-Ward "was really as bad as the people had stated it was" (Moore RT 437-439). His investigation confirmed anew the fact that

the credit of IMI-Ward "was as bad as they said it was" (Moore RT 466-467; Dep., vol. 1, pp. 12-16; 16-18).

Moore was obviously perturbed by Holmes and Orr's unexpected attempt to substitute a bad and thoroughly unsatisfactory credit for the credit of Union. As Mosher itself concedes, it realized at once that the request "would constitute a change in the agreement which it had theretofore had with Graver" (R 1470). As a result of the Holmes and Orr attempt, Moore no longer deemed it safe to rely solely upon the oral agreement of October 13 and the written agreement of October 16. He now resolved to demand directly from Union an explicit reaffirmation of its liability to Mosher. He was equally resolved that he would not release any of the materials then being fabricated by Mosher until he had received that reaffirmation from the lips of Union itself. He thereupon placed a stop order upon the very first shipment which was at that time virtually ready for delivery (Burton, RT 342-344).

On November 7, 1961, Harle, Graver's Director of Purchases, came to see Burton and Moore in Houston to ascertain why no shipment had been made as yet by Mosher. Harle was then informed that "a stop order" has been placed upon the very first shipment because "the credit matter" had not been straightened out. Burton told Harle "if we didn't get the credit matter straightened out, it would not be forthcoming . . ." (Burton, RT 342-344). Alarmed, Harle telephoned Page, Graver's Comptroller, and told him that the "shipments would be held up" by Mosher unless it received a positive reaffirmation from Union of Union's unconditional promise to pay (RT 355). Moore was equally explicit and uncompromising in talking to Page when Harle had finished (RT 355). Page told Moore that he would talk to Morton of IMI (RT 356).

On November 10, 1961, three days later, Jt. Exs. 9 and 10 were received at Mosher's Dallas office (Moore, RT 439-440), completely unsolicited and unanticipated (Moore, Dep. vol. II, pp. 47-48). Mitchell called Moore to inform him of their arrival. He was instructed by Moore to keep them on his desk "with no action on them" (Mitchell RT 169). The purpose of Jt. Exs. 9 and 10 soon became apparent.

On November 13, three days later, Orr called Moore and asked him to accept Jt. Exs. 9 and 10 "*strictly on the credit of IMI-Ward Industries* for shipment of the material" (Moore RT 358). Moore adamantly refused. Morton, IMI's President, then came on the phone and repeated the request. Again, Moore refused. "I told him", testified Moore, "we would not accept it on that basis" (Moore RT 359). Moore told Morton that he would not release any of the shipments unless Union agreed to pay Mosher directly for Mosher's work (Moore RT 360).

The telephone talk between Moore of Mosher and Morton of IMI on November 13, 1961 constituted the very last discussion between Mosher and IMI or IMI-Ward upon the subject of credit (Moore RT 360). In Moore's words, "there wasn't much else to say after that" (Moore RT 360). It is thus apparent that Mosher itself, both in the District Court and upon this appeal, has established beyond the possibility of controversy or dispute that Jt. Exs. 9 and 10 constituted no more than a written offer to Mosher, reiterating the oral offer by Holmes and Orr of October 31, to furnish Mosher with the credit of IMI-Ward *if and only if the credit of IMI-Ward was accepted as a substitute for Union's credit and Union were released of any obligation to Mosher*. That offer to substitute the credit of IMI-Ward for the credit of Union if Mosher's contract with Union were cancelled and Union released was the only offer that the Joint

Venture ever made to Mosher, be it October 31, November 10 or November 13, be it orally or by way of Jt. Exs. 9 and 10. And that offer, as the record conclusively shows, was unconditionally and unqualifiedly *rejected by Mosher* on each and every occasion when it was made (Moore RT 446-447). "To constitute acceptance, an offeree's manifestations of assent must be strictly within the terms of the offer." (*Merritt, Chapman & Scott Corp. v. Gunderson Bros. Engineering Corp.*, 305 F. 2d 659, 662).

It is apparent, therefore, from Mosher's own version of each and every communication between Mosher and IMI-Ward that IMI-Ward's offer of its own credit as a substitute for the credit of Union terminated with its rejection by Mosher on November 13.³ That offer was never renewed by any representative of IMI-Ward to anyone connected with Mosher. It could not very well have been. On November 13, when Orr and Morton again offered to Mosher the credit of IMI-Ward as a substitute for Union's credit, the Joint Venture still possessed a right to the contract monies with which it might hope to discharge any

³ Mosher claims that it *accepted* Jt. Exs. 9 and 10 "after the Page conversation on November 15", although, concededly, there was absolutely no communication of any kind between Mosher and IMI-Ward after November 13, and the sole basis upon which Jt. Exs. 9 and 10 had been tendered by IMI-Ward to Mosher had never changed. Thus, Mosher states (R 1440) :

"It must always be remembered not only that the testimony of all the Mosher witnesses was to the effect that the Joint Venture Purchase Orders *were never accepted by Mosher until after the Page conversation on November 15*, but also that the *Mosher Shop Orders and other documents* in the record *show conclusively that Mosher undertook no obligation or benefit under the Joint Venture Purchase Orders until November 16*, and that the Joint Venture Purchase Orders were not even sent to the Home Office in Houston by Mr. Mitchell until that date, because he had held them on his desk from November 10 until November 16, *pending confirmation of the Graver responsibility.*"

obligation to Mosher. After its rebuff by Mosher on that day, after the Joint Venture had authorized Union to deduct its payments to Mosher from the Joint Venture contract, it would have been sheer lunacy for the Joint Venture to pledge its credit *when it no longer possessed any right to the monies which would enable it to discharge that obligation*; when those funds would be deducted by Union from its contract; when Union had unconditionally promised to pay Mosher direct; and the possibility of substituting IMI-Ward's credit for Union's credit had finally terminated on November 15 with Page's reaffirmation of Union's liability to Moore.

Mosher knew, on November 13, when it refused to accept Jt. Exs. 9 and 10 "strictly on the credit of IMI-Ward Industries" that the offer represented by those exhibits was at an end. That is why the acknowledgment copies of Jt. Exs. 9 and 10 were never signed and returned by Mosher (Moore RT 441-442). That is why Jt. Exs. 9 and 10 were simply filed and no attention was ever paid to them (Moore, Dep. vol. II, 47-48). That is why Mosher testified again and again *that it never relied upon or looked to IMI, Ward or IMI-Ward for payment, from the commencement of its work until its completion*, even though it was sending invoices to IMI for the purpose of accommodating its clerical and bookkeeping requirements (Moore, RT 446-447, 453, 468-469, 471).

2. IMI-Ward never promised to pay Mosher for its fabrication of Union's steel.

Viewed from yet another vantage point, the record conclusively establishes the fact that no promise to pay Mosher for its fabrication of Union's steel was ever made at any time by IMI-Ward. On November 13, after Moore had rejected Morton's renewed request that Jt. Exs. 9 and 10

be accepted "strictly on the credit of IMI-Ward Industries", Moore himself testified that he asked Morton "to get in touch with Mr. Page and give his approval of having them (Union) pay for this work" (Moore RT 359; M-Union 21). According to Moore, Morton stated that, if that was the only way, "he (Morton) would have to give his approval" to Union (Moore RT 360; M-Union 21).

On November 15, during his telephone conversation with Page, Moore asked Page "if he had gotten clearance from Mr. Morton on the responsibility of *Graver making payment* for the material that we were fabricating *for them*" (Moore RT 361; M-Union 22). Moore asked Page if he had obtained Morton's approval "for them (Union) to pay us direct and deduct it from the contract" (RT 362; M-Union 22-23). Page told Moore (RT 362; M-Union 23):

"He said that he had talked to Mr. Morton and Mr. Morton had given him approval."

Thus, Mosher itself irrefutably confirms the fact that Morton of IMI never promised Mosher that IMI or IMI-Ward would pay Mosher for its fabrication of Union's steel. What Morton indicated on November 13 that he might be compelled to do—approve the modification of the Joint Venture contract with Union which would provide for Union's deduction of monies payable to Mosher by Union—is precisely what he did do (Jt. Ex. 26). Consequently, by Mosher's own admissions, it was not IMI-Ward which committed a breach of any obligation which was even remotely due and owing to Mosher; it was Union, and only Union, which violated its clear, explicit and unconditional promise to pay Mosher directly for Mosher's fabrication of Union's steel.

Mosher's attempt to sustain its judgment against Ward upon the theory that, in some unfathomable manner, a con-

tract for its benefit was consummated between IMI-Ward and Union on November 13 is hopelessly untenable. A contract for the benefit of a third party is "a contract in which the promisor engages to the promisee to render some performance to a third person . . ." (Williston on Contracts, 3rd Ed., Vol. 2, §347, 792; §§402-403, 1089-1095). Although the promise is made to the promisee, the promised *performance is to be rendered directly to the third person*. Thus, in *Tomaso, Feitner & Lane v. Brown*, 4 N. Y. 2d 391, a corporation which planned an advertising campaign had received the promise of a major stockholder to furnish it with the funds to pay for such advertising services. Thereafter, he defaulted in his promise to the company to furnish it with funds. The advertising agency thereupon brought an action against the stockholder allegedly as a third-party beneficiary of the agreement between the stockholder and the company. The action was dismissed because the requisite monies were to be made available to the corporation and not to the advertising agency. (See also: *Warsawer v. Burghard*, 234 App. Div. 346)

3. The judgment against Ward is insupportable in fact and law.

The balance of Mosher's attempt to find a factual or legal rationale for its judgment against Ward consists of a tangled web of contradictions, misstatements and improvisations. Some of the choicer examples follow:

1. On page 26 (M-Ward), it is stated that "Mosher did not extend credit or deliver goods to IMI, but *to a Joint Venture* composed of IMI and Ward." Nine pages earlier, however, in the very same brief, Mosher admits (M-Ward, p. 17) that: "Ward's final contention that Mosher refused

to, and *did not, rely on the credit of the Joint Venture* or expect to be paid by it, *is absolutely true from the record . . .*”

2. At pp. 25 et seq. (M-Ward), Mosher formulates a brand new theory of its claim against Ward in the following language:

“Mosher did not sue on, or obtain a judgment against Union in this proceeding on the basis of the oral contract made on October 13, 1961 or the letter agreement dated October 16, 1961 which constituted an interim purchase order for the Tucson work between Mosher and Union. . .

Thus, at the Joint Venture’s own solicitation, a new contractual relationship was created with Union’s consent, so that Mosher was necessarily relieved of its duties under the October 16 interim purchase order and became obligated under the Joint Venture purchase orders and the agreement with Page that if Mosher would so perform, Union would pay Mosher.”

Although newly improvised by Mosher, an identical thesis characterized as “metaphysical reasoning” was rejected by this Court as long ago as 1902 in the case of *Alaska Packers Ass’n v. Domenico*, 117 Fed. 99, 103, the principles of which were reaffirmed by this Court in *Power Service Corporation v. Joslyn*, 175 F. 2d 698, 701.

If Mosher was “necessarily relieved of its duties under the October 16 interim purchase order . . .”, Union, obviously, was equally relieved therefrom. The precise contrary of that assertion was established by Mosher in the court below. Thus, Moore swore under oath as follows (Moore, Dep. vol. 1, 58):

"Q. *Did anybody at Mosher to your knowledge ever release Graver from its responsibility under the October 16 letter?*

A. No." (Italics ours)

Again, Mosher stated (R 1431):

"At the time when this new arrangement was made, Union was bound to Mosher under the October 13 agreement, as embodied in the October 16 letter. As the result of the new agreements, which resulted from the request of Union and the Joint Venture (see Lancaster's memo to Branting dated November 7, 1961-Union L), the Joint Venture Purchase Orders were accepted, but Union *remained bound to pay. There is absolutely nothing in the record to indicate that Mosher ever released or intended to release Union from its obligation insofar as payment was concerned.*" (Italics ours)

Finally (R 1406):

"Union's liability under the interim purchase order (Pl. 1) *was not cancelled or relieved* by virtue of the two purchase orders (Jt. 9 and 10), received from the IMI-Ward Joint Venture, but said purchase orders created an additional obligor to the Plaintiff, *who did not release Union from its liability*, but, prior to, and as a condition of, the acceptance by it of such purchase orders, substituted for the formal purchase order it was to have received from the Defendant Union on the Davis-Monthan job, Union's oral agreement to pay the amount to become due for the work, materials and freight charges for the Tucson missile site and the Vandenberg missile site." (Italics ours)

3. Mosher insists that the addition by its witnesses of the words "Ward Industries Corporation" or "Ward" to the word "IMI" in their description of what transpired herein was not an "afterthought" (M-Ward 15) and refers, by way of proof, to its Miller Act letter to Fluor dated March 19, 1966 "long before any depositions were taken . . ." (M-Ward 15). The Miller Act letter to which Mosher refers was concededly the language and product of Mosher's counsel (Moore, Dep. vol. II, p. 36; RT 402). The letter immediately preceding that handiwork, to wit, Moore's letter of February 20, 1962, after IMI's bankruptcy, was the language of Moore in which he advised Fluor, without the ministrations of its counsel, that it furnished "*Idaho-Maryland Industries, Inc.*", not *IMI-Ward*, "with approximately \$296,000.00 of fabricated steel and for fabricating steel furnished by Graver Tank" (Jt. Ex. 81; RT 402; Moore Dep., vol. II, pp. 32-35).

Mosher complains that the quotations from the record set forth in Ward's Opening Brief (pp. 20 et seq.) were unfair since, if "the witness could fairly understand that the question was whether it was the Joint Venture or IMI alone which was involved, the witness on deposition answered very clearly . . ." (M-Ward 16). The example cited by Mosher at page 16 is a classic example of a leading question in which the question itself supplies the answer desired by counsel to the alerted witness.

Without the guidance of counsel, Moore swore under oath (Moore R 43):

"I was informed that *Idaho-Maryland Industries, Inc.* desired that *it* be substituted as the contracting party in lieu of Graver Tank and Mfg. Company due to bookkeeping and other problems with which Affiant was not concerned."

Moore (RT 437):

"Q. Well, now, to whom did they (Holmes and Orr) want the customer changed? What name did they want to substitute?

A. They wanted the name changed to *Idaho-Maryland* for convenience." (Italics ours)

Burton swore under oath (Burton RT 339):

"On October 31 I recall Mr. Holmes and Mr. Orr of *IMI* came into my office and asked me if I was getting along with the Tucson job." (Italics ours)

Again (Burton RT 339-340):

"And then I went with them to Dallas and sat down with Mr. Mitchell and worked out things with the sales department, what they were concerned with. And during the course of events they raised the question about transferring the contract *from Graver to IMI.*" (Italics ours)

Again (Burton RT 341):

"Well, they said on account of bookkeeping or processing of invoices etc. for payment that it would be better if the order or the invoices would be handled *through IMI.*" (Italics ours)

Burton (RT 343-344):

"Question. Can you tell me what you heard Mr. Harle say to Mr. Page when he got him on the telephone?

Answer. He told Mr. Page that . . . the *IMI* people had requested a transfer of the order to that name for accounting purposes, but that Mosher would not transfer the order until Graver would stand good for payment, . . .” (Italics ours)

Burton (RT 346):

“Question. Tell us what Mr. Moore had to say in substance.

Answer. Mr. Moore said that *IMI* had requested a transfer of the order on the contract from Graver, but that we wouldn’t accept it without Graver being responsible for the payment of the material, . . .” (Italics ours)

Mitchell (RT 161-162; Ward’s Ex. F, RT 163):

“A few days thereafter representatives of *Idaho-Maryland Industries, IMI*, appeared in affiant’s office . . . and asked affiant and Mr. Ralph Burton, vice president of the Mosher Steel Company, whether Mosher Steel Company would deal in the matter with *Idaho-Maryland Industries* rather than with Graver Tank and Manufacturing Company. Such representatives were informed . . . that Mosher Steel Company would not deal with *Idaho-Maryland Industries, IMI*, unless Graver Tank and Manufacturing Company remained liable under the agreement.” (Italics ours)

The most superbly coached witnesses, under testimonial stress, often forget their script and recall only the facts. That is precisely what happened to Mosher’s witnesses in

this case.⁴ Even counsel are not immune to so human a frailty. For example, Union's attorneys, dedicated to the proposition that Jt. Exs. 9 and 10 are "IMI-Ward purchase orders", forgot themselves long enough to record at page 45 of its opening brief that:

"In the present case, following receipt of *IMI's* purchase order, *IMI* was described on Mosher's shop records and ledger as its customer for whom the work was being performed and all invoices covering that work were sent to *IMI*, rather than Graver (Jt. Ex. 13 and 14), (M. Ex. 22-A)."

4. Mosher's treatment of the testimony of its own witnesses that, from start to finish, Mosher *never* relied upon or looked to IMI, Ward or IMI-Ward for payment, is an extraordinary feat of verbal legerdemain (M-Ward 17). We are told that, although Ward's "contention . . . is *absolutely true from the record*" (M-Ward 17), that did not mean "that Mosher relied only on the credit of Union" (p. 17). "... we have", says Mosher, "no Mosher agreement to look solely to Union for payment" (M-Ward 18).

⁴ In this area, Mosher was reduced to the necessity of quoting Orr. Thus, Mosher states (M-Ward 17):

"Mr. Orr testified that the IMI printed forms were used because no Joint Venture printed forms were available. This is doubtless true."

Had Mosher examined the exhibits before making such a statement, the enormity of Orr's falsification would have been apparent. Orr testified that "later"—after November 3, 1961, the date of Jt. Exs. 9 and 10—"we got a stamp which said Joint Venture" (RT 856). As we pointed out in our opening brief (49, ft. 10), a stamp with the inscription "and Ward Industries Corporation, a joint venture", had been added to the printed inscription "Idaho-Maryland Industries", wherever requisite, continuously from September 18 to November 3. In fact, a second stamp was also used during this very same period which bore the inscription "IMI-Ward—Joint Venture". (See invoices #05522, 05521, 05293, 05294, 05299, 05504, 05296 and 05502 contained in Union Ex. UU).

Consequently, concludes Mosher, the fact that Mosher demanded and received the credit of Union does not effect "a release of the Joint Venture's obligation . . ." (M-Ward 21).

"Unless we are prepared to adopt the theory of the cynic that language was invented for the purpose of concealing thought" (*Johnson v. Travelers Insurance Co.*, 269 N. Y. 401, 407), Mosher cannot evade, avoid or torture the unconditional and unqualified phraseology of the testimony of its own witnesses that "from start to finish, from the beginning of the work of your company (Mosher) until its completion", Mosher had "*never* looked to IMI . . . or to Ward for payment" (Moore RT 446-447 ; 454 ; 468-469 ; 471). The sworn testimony of Mosher's witnesses has irretrievably destroyed Mosher's claims against Ward in this case beyond any possibility of repair by its counsel upon this appeal through the medium of semantic gymnastics.

5. Throughout the course of its brief, Mosher repeatedly asserts, as did the District Court, that its fabrication of Union's steel was performed "pursuant to" Jt. Exs. 9 and 10. In FF 39, the Court below had referred to Page's promise on November 15, 1961 to "pay Mosher directly for all the work *described* in Jt. Exs. 9 and 10" which concededly repeated in haec verba the precise terms and conditions set forth in the letter agreement of October 16, and confirmed the oral agreement of October 13. A due regard for accuracy would have required the Court to refer to the work of fabrication *as being described in the letter agreement of October 16* since it could hardly be stated that the work continuously performed by Mosher from October 16, 1961 could have been described in a document which was not even born until several weeks later. In FF 39, the District Court proceeded from its reference to "the work *described* in Jt. Exs. 9 and 10 in evidence" (R 1232)

to the statement, in the very next sentence of the same finding (R 1233), that, upon the receipt of Page's promise, Moore "permitted the release and shipment of the steel fabricated by Mosher *pursuant* to Jt. Exs. 9 and 10 . . ." The chasm between the work "described" in those exhibits and the work performed "pursuant to" the same exhibits was bridged by the District Court without a pause.

It would undoubtedly be equally accurate to say that Mosher performed the work of fabrication *described* in the several briefs herein. It is quite a different matter to say that Mosher performed the work of fabrication *pursuant* to the various briefs herein. Not even Mosher, facile as it is, has been able to explain how the more than \$40,000.00 of work which it performed prior to November 16, 1961 (FF 24, R 1227) could have been performed "pursuant to" documents which, concededly, did not then exist.

6. Mosher has literally dumped into its brief against Ward five Illinois citations which it indiscriminately gathered from its brief against Union, all of which deal only with the applicability of the Illinois Statute of Frauds to Page's oral promise to Mosher of November 15. Limited to the Illinois statute, they are unintelligible against Ward. None of them deal with the question of whether a promise to perform what one is already legally bound to perform can constitute a valid or sufficient consideration for the subsequent promise of another to pay. None of them are pertinent upon any other issue relevant to this appeal.

In our Opening Brief, pp. 66 et seq., we emphasized the fact that, under New York law, a third party was bound by an agreement between two joint venturers restricting their authority, and that "Because there is a joint venture, it does not necessarily follow that there is a mutual agency

even as to third parties", citing *American Mut. L. Ins. Co. v. Hanna, Zabriskie and Dacron*, 1941, 297 Mich. 599, 298 N.W. 296.

The rules of law set forth in *Hanna, Zabriskie and Dacron, supra*, were approved and applied by this Court in *Matanuska Valley Bank v. Arnold et al*, 223 F. 2d 778 (1955), wherein this Court ruled at 780:

"A joint venture is distinguished from a partnership in that one member cannot bind another unless he has either express authority or authority implied from the necessities of the particular transaction with which the joint venture is concerned. See *American Mut. Liability Ins. Co. v. Hanna, Zabriskie and Dacron*, 1941, 297 Mich. 599, 298 N. W. 296, 299. *Davis, as a joint adventurer, did not have the general implied authority of a partner in an ordinary trading or commercial partnership.* * * *" (Italics ours)

Ward's Reply to Union

Union's primary objective upon this appeal is to divest itself of any responsibility for its wanton deception of Mosher by foisting a spurious and concocted obligation upon Ward. Its assault upon Ward in its opening brief is Procrustean, stretching or dismembering the facts to fit its preconceived legal theory precisely as the giant Procrustes in Greek mythology stretched or dismembered the limbs of a luckless traveller to fit him to the giant's iron bed.

In its recital of what it calls "the facts", it has completely omitted to inform this Court that, with the single exception of the malodorous Orr,⁵ *Union did not offer a*

⁵ Orr's testimony was discussed in detail at pp. 48 et seq. of Ward's Opening Brief.

single witness or a single document against Ward during the course of the trial below. Typical of the exchange which occurred with every Union witness, excepting Orr, was the following after Union called its first witness, R. R. Branting (RT 510):

“Mr. Lotterman: Just a moment, I object to all this testimony as not binding upon Ward or in the presence of any representative of Ward. The conversation or any conversation between Mr. Branting and Mr. Lancaster of the Graver organization cannot possibly be binding upon Ward in this action.

Mr. McConnell: We are not offering it to bind you in any capacity, or to create any contractual relationships between you or anybody else. * * *

The Court: On the basis stated by Mr. McConnell, it will be received.”

* * *

“Mr. Lotterman: I assume, your Honor, I will have a continuing objection without the need of voicing it, on this entire line of testimony, including these documents?

The Court: It's not being considered as to you. Mr. McConnell has said he's not offering it against you. * * * (RT 512)

Mr. Lotterman: I assume this document is not being offered against us.

Mr. McConnell: I am not offering it against you, counsel. * * * (RT 514)

* * *

Mr. Lotterman: I object to it, Your Honor, it purports to deal with a conversation not in our presence. Also purports to state what someone else at the other end of a telephone said to somebody else at the other end of a telephone, to which the

witness, although the person wrote the memorandum, could not possibly have heard or understood or know about it except from someone else. It is triple hearsay if I have ever seen anything that is triple hearsay.

Mr. McConnell: I am not offering it against you, counsel.

The Court: It may be received as to the plaintiff. Union's K in evidence. * * * (RT 516-517)

* * *

A. During the time that I was in Tucson I knew that Mosher had been employed by the Joint Venture as a subcontractor to fabricate steel. Their shipments were coming in.

Mr. Lotterman: Just a moment, I move to strike out that question—I mean that answer, I'm sorry—I knew that Mosher had been employed.'

Mr. McConnell: If the Court please, we're not offering any of this witness' testimony against Mr. Lotterman or his client, or we are not trying to establish a plaintiff's case against Mr. Lotterman's client." (RT 538)

Similar exchanges occurred with Union witnesses, Middleton (RT 543, 555, 569-570), Deane (RT 603), Page (RT 696-697, 727-729) and Van Gorkom (RT 866).⁶

Having thus immunized the witnesses and documents which it offered upon the trial against Mosher from any cross-examination or counter testimony by Ward upon the explicit representations that none of its witnesses or documents were being offered against Ward, Union now proceeds with unbelievable irresponsibility to cite that very testimony and those very documents as evidence of "facts"

⁶ Harle, Union's remaining witness, testified to nothing concerning Ward.

purportedly binding upon Ward which ostensibly justify the imposition of liability upon Ward. The alleged "facts" by which Union hopes to induce this Court to absolve it of its liability to Mosher need not detain us long:

1. At p. 1 of its brief, Union commences with the statement that Mosher's steel fabrication was "undertaken for the defendant Ward Industries Corporation and its joint venturer Idaho-Maryland Industries, Inc." That statement is totally false. The fabrication work was undertaken by Mosher, as Mosher itself admits, for Union.

2. Likewise at p. 1, it is stated that "the material fabrication was ordered by the Joint Venture. . . ." Again, the testimony of Mosher itself has conclusively established that the metal fabrication was ordered by Union.

3. Throughout the course of its brief, Union repeatedly asserts, in different forms, that "Union paid the Joint Venture for the steel fabrication work. . . ." (p. 1). Such a payment was allegedly made by Union's purported payment to the United California Bank of all of the IMI-Ward invoices which had been assigned to that Bank prior to the IMI bankruptcy (p. 17). Thus, it is asserted that "the bank presented these invoices (which allegedly included the invoices for Mosher's work) to Graver and received payment thereon" (p. 17). Union thereupon concludes that at the time of the IMI bankruptcy on February 2, 1962, the United California Bank had been paid in full upon all of the invoices which it then held as assignee.

All of these allegations are blatantly false. As Morton, IMI's President, testified, Union did *not* pay to the Joint Venture the monies due and owing to IMI or the Joint Venture at the time of the IMI bankruptcy (Morton, Dep. 1, 124). On the contrary, its failure to do so precipitated

that bankruptcy. Nor were the invoices held by the United California Bank paid by Union. On the contrary, on July 20, 1962, the Bank commenced an action against Union in the California Superior Court, Los Angeles County, upon invoices which Union had refused to pay amounting to the sum of \$536,532.67. That action was subsequently removed to the United States District Court for the Southern District of California and was specifically noted in the opinion of this Court in one of the prior litigations between Union and Ward which reached this Court.⁷

In fact, in the settlement agreement between Union and Ward dated October 3, 1963, noted in this Court's opinion in 361 F. 2d 43 at 47, Ward was compelled by the explicit terms thereof to obtain a general release from the United California Bank to Union (R 385-386). It could only do so by paying to the Bank the sum of \$536,532.67 for which the Bank had brought its action against Union.⁸ Thus it is Ward and not Union which will be called upon to pay twice if the judgment against it is not reversed upon this appeal.

⁷ *Dragor Shipping Corporation v. Union Tank Car Company*, 361 F. 2d 43, 46, footnote 7. This Court, in addition, also dealt with two other phases of prior disputes between Union and Ward in 371 F. 2d 722 and 378 F. 2d 241.

⁸ On June 29, 1967, after this Court had reversed the second decision of the Arizona District Court in 378 F. 2d 241, Union moved the Arizona District Court to vacate its prior order dismissing the original Arizona actions which had been compromised and settled by the October 3, 1961 settlement agreement, requesting that the parties be restored to the status quo which existed before that settlement agreement was executed and before those actions were dismissed thereunder with prejudice. In opposing that application which the Court denied, Ward emphasized that it would be impossible to restore the parties to the then status quo because, among other things, it had already paid the United California Bank the sum of \$536,532.67 for a dismissal with prejudice of the Bank's action against Union and that sum could not possibly be restored to Ward. None of these facts was denied by Union before the Arizona District Court which, as aforesaid, denied Union's motion on August 2, 1967.

The falsity of Union's assertion in its opening brief that the United California Bank had been paid by Union is eloquently underscored by the completely contradictory argument which it makes at pp. 56 et seq. that "Mosher's invoices did not become payable until after IMI entered into bankruptcy on February 2. . . ." It is impossible to comprehend how Union can argue that Union had paid all of Mosher's invoices for its steel fabrication and, simultaneously, that Union was not required to pay such invoices because they "did not become payable until after IMI entered into bankruptcy on February 2."

4. To claim, as Union has claimed throughout the course of its brief, that Ward, and Ward alone, is liable to Mosher "as the party primarily responsible" (Union Br., p. 59) is fatuous self-deception. There is no question of the fact upon this record that Mosher was unmercifully tricked by Union, or to use Mr. Van Gorkom's more elegant phrase, "stalled along by the Graver personnel". (RT 875-876; Jt. Ex. 27) There is no doubt, also, of the fact that, had Mosher been more persistent and less trusting, it would have received the letter of Union's commitment, precisely as Page had promised.

Mosher was not the only company to be employed by Union for the fabrication of its steel. A good deal of the Vandenberg steel fabrication work which the Denver Steel and Iron Company was unable to perform within Union's time schedule was deleted from the IMI contract by Union in precisely the same way as the Tucson fabrication work was deleted. That work was awarded by Union to Allied Engineering Company under exactly the same circumstances as Union's grant of the Tucson work to Mosher. Allied was furnished by Union with a letter dated November 7 which constitutes almost a verbatim copy of the

letter dated October 16 received by Mosher. (Pl. Ex. 16) The only difference between the two is that, in the case of Tucson, Lancaster, Graver's Vice-President for Construction, had authorized Sam Wilson to execute that letter on behalf of Graver without committing Lancaster's signature thereto.

Allied was much more astute. It insisted that its letter be executed, not by Sam Wilson of Denver on behalf of Union, but by Lancaster as Vice-President of Graver. It also insisted upon a written agreement whereby Union, under the signature of Lancaster as Graver's Vice-President, undertook in writing to pay Allied directly, modifying its contract with IMI to delete the Vandenberg fabrication work therefrom and reduce the contract price accordingly. (Pl. Ex. 17)

In short, the Union-Allied transaction paralleled in every respect the Union-Mosher transaction, with the sole exception of the fact that Mosher allowed itself to be hoodwinked into accepting Union's oral promise,⁹ whereas Allied insisted upon, and obtained, Union's written undertaking. Consequently, applicable thereto is the universal

⁹ On June 11, 1962, Ed Mosher and Moore of Mosher called upon Van Gorkom, then Union's Executive Vice-President and now its President, to request payment from Union (RT 865). As a result of their demand, Van Gorkom purportedly conducted an investigation into the circumstances surrounding Mosher's fabrication of Union's steel culminating in a written report to Browder, Union's general counsel (Jt. Ex. 27). Among the persons in the Union organization whom Van Gorkom interviewed was Page. For sheer callousness, the following testimony by Van Gorkom would be impossible to match (Van Gorkom, Dep. pp. 76-77) :

"I asked him (Page) whether Moore had ever followed up when he didn't get the letter, and he said no, he did not.

Now, we know from other things I testified that he did call Trytten, but that was roughly a month later, and I said to Page, I said, 'You mean, in other words, that when the letter wasn't forthcoming, that Moore did not call up and harass you,' and he said, 'No, he did not.' And then I said, 'Well, I guess he then just left the thing go too long.' " * * *

principle of law that (Williston on Contracts, 3rd Ed., vol. 1, §67A, p. 216):

“An offeree who has unjustifiably led the offeror to suppose that he had acquired a contractual right should not be allowed to assert an actual intent at variance with the meaning of his words or acts.” * * *

5. At pp. 66 et seq. of its brief, Union reiterates a contention which it obsessively pursued in the court below, to wit, “that Mosher be ordered first to seek satisfaction from Ward before proceeding against Union” upon the ground that “Mosher has charged Union as a surety or party secondarily liable for an indebtedness the payment of which remains the primary responsibility of the defendant Ward” (p. 67). The authority for this extraordinary claim is purportedly found in the Arizona statute, ARS, §12-1642.

The foregoing argument, asserted at various times throughout the course of this action, is false in fact and void in law. None of the causes of action contained in the several counts of the plaintiff’s amended complaint purports to impose upon Union a *secondary* or *derivative* responsibility predicated upon the acts of Ward or IMI vis-a-vis Mosher. On the contrary, every one of the Mosher causes of action against Union is founded *solely, entirely* and *exclusively* upon the *direct, original* and *primary acts* and *conduct* of Union itself, as a result of which Union incurred a primary and direct liability to Mosher.

In reviewing the allegations of the plaintiff’s amended complaint, the Court below stated to Union’s counsel during the course of the pre-trial hearing (RT 11-12) that “Mosher is not claiming that you are an indemnitor . . . , but as I read their pre-trial memorandum, they were treat-

ing you as a person *primarily liable*, a person who actually ordered this, and that again *as a person who is primarily liable*, it is promissory estoppel that you had told him that you were going to give him this writing, and they went ahead on the basis of that and furnished it, and then you didn't furnish it . . ."

In its Findings of Fact (##21-24 inclusive), the District Court found that Union contracted directly with Mosher on October 13, 1961, *many weeks before* there is the slightest suggestion that any obligation to Mosher for any purpose was incurred by IMI or IMI-Ward. In its Conclusions of Law (#3), the District Court ruled "Mosher *had a direct contractual relationship with Union . . .*" Not only did Union incur a direct, primary and individual obligation to Mosher on October 13, 1961; it repeatedly reaffirmed its direct and primary obligation to Mosher on many occasions thereafter, all of which have been found by the Court in its findings of fact.

Although we vehemently disagree with the District Court's imposition of liability upon Ward, it must be noted that its ruling was predicated solely upon the issuance of Jt. Exs. 9 and 10 which were not received by Mosher until November 10, 1961 (FF #30), *almost a month after Union had already obligated itself to Mosher for the fabrication in question*. Consequently, the Court found, as Mosher itself alleged, in paragraph 3 of Count 2 of its amended complaint that, by the issuance of Jt. Exs. 9 and 10, "Ward Industries Corporation, defendant, became *an additional obligor* to plaintiff for said sum." Obviously, therefore, if anyone should be primarily responsible for the payment of the within judgment, and should be directed to apply its assets first to the discharge thereof, it should be Union and not Ward. Ward's alleged liability as "an additional

obligor" would never have arisen if Union had properly and promptly discharged its original and primary obligation to pay Mosher.

Under these circumstances, it is perfectly obvious that Article 9, Title 12, Arizona Revised Statutes, §12-1642 has no possible application to the case at bar. It will be noted that subdivision A refers to an action "*brought against two or more defendants upon a contract, and one or more defendants are surety for the others * * **".

The specific phraseology of the quoted section, as well as other sections of Article 9, compels the following conclusions: Firstly, the action must be brought against *two defendants* upon the *same contract* and *not* upon the separate, individual, primary, independent and unrelated promises of each. Secondly, one of the defendants must be "bound as surety" for the other upon that same contract. He cannot be deemed a surety if he is held liable *upon his own separate, individual, independent and unrelated promise*. Thirdly, the issue of suretyship, if such an issue exists, must be "tried and determined . . . before the trial". No such issue was ever tried and determined before the trial herein. Fourthly, if such an issue is determined in favor of the surety in an action brought against it, the Court's power is limited to an order directed to the sheriff to levy execution upon the property of the principal which is subject to execution "*and situate in the county in which the judgment is rendered.*" It could not possibly authorize the mandate sought by Union herein. Finally, these provisions of the Arizona statute relating to the provisions of a judgment to be entered in a state court, find no counterpart in the Federal Rules of Civil Procedure, the provisions of which must prevail (*Kunzel v. Universal Car-loading and Distributing Co.*, 29 Fed. Supp. 407, 410).

CONCLUSION

We would prolong this brief to unmanageable lengths if we were to recite every contradiction, every misstatement and every improvisation adopted by Mosher and Union upon this appeal in their respective efforts to sustain a judgment against Ward for which there is no factual, legal, moral or ethical justification. Sufficient has been adduced in our opening brief and in this reply brief to underscore the invalidity of the judgment against Ward and the necessity of reversing the same and dismissing Mosher's claims against Ward in this action upon the merits.

Respectfully submitted,

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Certificate of Compliance

I certify that, in connection with the preparation of this reply brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing reply brief is in full compliance with those rules.

JOSEPH LOTTERMAN
Attorney

No. 21307

In the
United States Court of Appeals
FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD.,
et al,
UNION TANK CAR COMPANY
WARD INDUSTRIES CORPORATION,
now known as DRAGOR SHIPPING
CORPORATION,

Appellants,
Cross Appellees,

v.

U.S.A., Ex REL MOSHER STEEL
COMPANY,

Appellee,
Cross Appellant.

No. 21307
No. 21307A
No. 21307B
No. 21307C

**BRIEF OF APPELLEE MOSHER STEEL
COMPANY RESPONDING TO APPELLANT
WARD INDUSTRIES CORPORATION**

FILED

DEC 1 1967

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No. 21307

In the
United States Court of Appeals
FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD., et al, UNION TANK CAR COMPANY WARD INDUSTRIES CORPORATION, now known as DRAGOR SHIPPING CORPORATION,	}	No. 21307
<i>Appellants,</i>		No. 21307A
<i>Cross Appellees,</i>		No. 21307B
<i>v.</i>		No. 21307C
U.S.A., EX REL MOSHER STEEL COMPANY,	}	
<i>Appellee,</i> <i>Cross Appellant.</i>		

**BRIEF OF APPELLEE MOSHER STEEL
COMPANY RESPONDING TO APPELLANT
WARD INDUSTRIES CORPORATION**

JURISDICTIONAL STATEMENT

The jurisdiction of the court below with respect to Mosher's claim for relief against Ward was based on diversity of citizenship, the amount in controversy exceeding \$10,000 (28 U.S.C. 1332). Mosher is a Texas corporation having its principal place of business in the State of Texas (R. 268, 1220). Ward Industries Corporation, now known as Dragor Shipping Corporation, is a corporation organized and exist-

ing under the laws of the State of Delaware, having its principal place of business in the State of New York (R. 1221).¹

Jurisdiction of this court is invoked by Appellant pursuant to 28 U.S.C. sections 1291 and 2107, and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Appellant Ward in its Statement of the Case adopts a similar approach to that which Union adopted in its brief in presenting its own version of the facts, some of which were disputed, admittedly. In so doing, Ward largely ignores the findings which the Court has made in resolving the disputed facts, and, in effect, from partial quotations from the Reporter's Transcript, attempts to present its case on the facts from the dead record as if the trial, and the Trial Court's findings, had never occurred.

This Court will note, however, that in Ward's Statement of the Case, it is stated that Mosher fabricated and furnished materials *to Union* and performed *for Union*; whereas, of course, in Union's brief, Mosher is said to have fabricated and furnished materials *for Ward* and performed *for Ward*. As a result of this linguistic exercise, Appellee's brief could be entirely consumed in pointing out the errors in Ward's statement, but Appellee will attempt to restrict itself to things which appear to be of consequence.

For example, on page 3 of Ward's brief, the statement is made that the judgment granted against Ward results solely from the claim that Ward "became an additional obligor" for the amount of Union's indebtedness to Mosher.

¹ The following terminology and abbreviations as used in the trial court are employed in this brief: Union and Graver are one and the same; Joint Venture is the same as IMI-Ward; "R"—Record on Appeal; "RT"—Reporter's Transcript; "Jt."—a stipulated joint exhibit; "Pl."—exhibits introduced in evidence by Mosher; Ward and Union exhibits, respectively, identified by Ward and Union.

In this statement Ward ignores Count III of the Amended Complaint (R. 269, et seq.). On pages 4 and 5 of Ward's brief, it is stated that "Union, and Union *alone*—employed Mosher—." While this statement may be correct as to the October 13 meeting between Mitchell, Burton, and Wilson, and the October 16 letter from Mitchell to Wilson (Pl. 1), the interim purchase order between Mosher and Union, it completely ignores and is certainly false with respect to the contractual arrangements which occurred subsequently wherein the Joint Venture purchase orders (Jt. 9 and 10) were issued in lieu of a formal Graver purchase order and all of the facts surrounding that transaction. The accusation is even made on page 9 of Ward's brief that Mosher's officers ignored their oaths. Suffice it to say, the Trial Judge believed Mosher's officers after days of testimony upon the stand and numerous pre-existing depositions, to say nothing of the testimony of all the other witnesses which substantiated the testimony of Mosher's officers. Testimony relating to Ward will be recited later in this brief in answer to Ward's Point I. The accusations that the Trial Court indulged in "pseudo syllogisms" exists only in the mind of the brief writer, ignore the Trial Court's Findings of Fact, and distort a rather simple and clearly understandable business relationship in an effort to avoid the obvious conclusions based upon that relationship.

As we pointed out in our Response to Union's brief, the simple facts of this transaction are as follows:

In the beginning, Union had a subcontract with Fluor for the Tucson job, and Matich Bros. and M. M. Sundt Construction Corporation for the Vandenberg job, a part of which Union in turn subcontracted to a Joint Venture composed of Idaho-Maryland Industries, Inc. and Ward Industries Corporation.

It became apparent that the Joint Venture could not perform its part of the work within the time allotted, and

Union, therefore, insisted that parts of the work be sent to others.

As a result of this, Sam Wilson negotiated on Union's behalf a contract with Mosher for the work to be performed at Tucson, and Mosher and Graver, through Wilson, Lancaster (Union's Vice President in charge of Tucson), and Harle (Union's Director of Purchases), entered into an agreement for the performance of the Tucson work, for the simple reason that Mosher would not accept the credit of the Joint Venture. This agreement began at the meeting on October 13, 1961, and is embodied in Pl. 1, the interim purchase order dated October 16, 1961, and agreements reached in Denver on October 23, 1961 between Mosher's representatives and Union's representatives. Mosher commenced performance pursuant to this interim purchase order and the promise that a formal Graver purchase order would be forthcoming.

It must be remembered that the Mosher work embodied in the October 16 letter was a part of the work *already contracted* by Union to the Joint Venture, and when George Morton, manager of the Joint Venture, received a copy of the October 16 letter, noted the prices which Mosher had quoted to Graver, and recognized that Mosher's prices were less than those which the Joint Venture had charged Union (Findings of Fact No. 42, R. 1233 and 1234), Morton did not want Mosher to deal directly with Graver, and sent his representatives to ask that Mosher accept Joint Venture purchase orders, not only for the Tucson work but also for a small amount of additional work in connection with the Vandenberg job. The Joint Venture's representatives informed Mosher that, because of the contract between Union and the Joint Venture, the supervision, accounting and billing would be better served if Mosher would accept the Joint Venture purchase orders in lieu of the formal Graver purchase order.

Mosher agreed to accommodate the wishes of the Joint Venture in this regard, but only if Union would be responsible for payment, since the credit of the Joint Venture was still unacceptable to Mosher.

After a final attempt by Morton to persuade Mosher to accept the credit of the Joint Venture, and after having been turned down again, the Joint Venture and Union agreed that Mosher would accept the Joint Venture purchase orders, fabricate and deliver the materials thereunder, bill the Joint Venture, and that after the Joint Venture had received the materials and approved the invoices, the invoices would then be paid direct by Union to Mosher, and the payments deducted from the contract price between Union and the Joint Venture. It was not contemplated that the Joint Venture would bill Union for the Mosher work, but rather that the Mosher invoices would be paid direct and deducted from the contract price.

This agreement between the Joint Venture and Union was, in turn, made with Mosher, and Mosher's requirements as to payment having been satisfied thereby, Mosher proceeded to perform, and did fully perform all of the work embodied in the Joint Venture purchase orders, and billed the Joint Venture. Then, pursuant to such agreement, of course, the promised formal Graver purchase order was no longer a part of the transaction.

The testimony and evidence surrounding Union's portion of these agreements is fully set forth in Appellee's Response to Union's brief. With respect to Ward, the performance by Mosher and its willingness to accept and perform for the Joint Venture the work embodied in the Joint Venture purchase orders, for the benefit of the Joint Venture and at its request, certainly constituted an adequate consideration upon which to predicate an agreement between Mosher and the Joint Venture, for the performance of which the

Joint Venture is indebted to Mosher. This is true, notwithstanding, as the Court has found, that Union, for its own reasons, in its own interest, and for considerations important to it, also is obligated to Mosher for the payment for the work.

It is axiomatic that two persons may each be separately obligated to a single person for the same performance, and that a single person may be obligated to two persons for the same performance. By ignoring this simple fact situation and the law applicable to it, Ward, having obtained the benefits which it desired and received from Mosher, seeks to avoid liability, primarily on the ground that Union was responsible for payment under the facts outlined above.

At the same time, in this suit by Mosher, neither Union nor Ward has seen fit to clarify their own relationships, inter se, for the obvious reason that they have settled their disputes as between themselves and agreed not to sue each other, and any testimony relating to their own relationships would doubtless have supported Plaintiff's case, and yet, the lack of testimony in the record relating to what the rights of Union and Ward were, or are, as against one another, is relied upon by both Union and Ward to cloud the issue of Mosher's rights. For example, so-called accounting testimony introduced by Union in an effort, which was not fruitful, to show that Union had overpaid the Joint Venture at the time of the IMI Chapter XI proceeding, was specifically offered by Union *only as to Mosher*.

The Trial Court's Findings of Fact with relation to the Ward obligation will not be quoted here, but the Court is respectfully referred to Findings of Fact No. 14 (R. 1224, 1225), No. 29 (R. 1228, 1229), No. 30 (R. 1229, 1230), No. 32 (R. 1230), No. 33 (R. 1230 and 1231), No. 34 (R. 1231), No. 39 (R. 1232 and 1233), No. 42 (R. 1233, 1234), No. 43 (R. 1234), No. 44 (R. 1234, 1235), No. 45 (R. 1235), No. 46 (R. 1235), and Conclusion of Law 4 (R. 1238 and 1239).

ARGUMENT

RESPONSE TO POINT I

The Court was correct in holding that a contract had been entered into between Mosher and IMI-Ward, that Mosher had fully performed the same, and that Ward was obligated to pay Mosher for that performance.

In its argument under its Point I, and in its Statement of the Case, Ward takes the same positions on the facts as it took in the trial court and in its motions for judgment, which positions were not regarded by the Trial Court as being correct, which were rejected by the Trial Court, and the contrary of which has now found its way into the Trial Court's Findings of Fact.

Ward has, nevertheless, in its Statement of the Case, recited and argued the effect of certain testimony and evidence, attempting to show that Mosher did not deal with IMI, Ward, or IMI-Ward Joint Venture, but that if Mosher dealt with any of these entities, it dealt solely with IMI, not as a member of the IMI-Ward Joint Venture, but in some way separately and apart from the Joint Venture. Ward further states that Mosher relied on the credit of Union and refused to accept the credit of IMI-Ward. In view of the above, it is believed appropriate to recite passages from the testimony and evidence which fully substantiate the Court's findings with respect to the fact that Mosher did in fact enter into an agreement with the IMI-Ward Joint Venture and that it did so with the Joint Venture, and not with IMI in some other capacity (Finding of Fact No. 43, R. 1234). This testimony and evidence is as follows, from the record:

On October 31, 1961, Wallace Orr, who was "Director of Contracts for the IMI-Ward Joint Venture" (R.T.

786), and William Holmes, Manager of Construction for the IMI-Ward Joint Venture (R.T. 791), came to Houston to see Mr. Burton, Vice President of Mosher Steel. Their coming was unannounced, insofar as Mosher was concerned. (R.T. 261).

Prior to their coming to Houston, Mr. Morton, Manager of the Joint Venture, had given Orr a copy of the October 16 letter (Pl. 1) (Union's QQQQ), and Morton told him to go to Houston to "negotiate a contract or a subcontract between the Joint Venture and Mosher for the protection of both parties." (R.T. 791). This date, of course, was subsequent to the October 13 meeting in Dallas between Wilson and the plaintiff, and subsequent to the October 16 letter. In Houston, Holmes and Orr met with Burton and then came to Dallas to talk with Mitchell. At that time, Orr pointed out that he was negotiating for and representing the Joint Venture of Idaho-Maryland Industries, Inc. and Ward Industries Corporation. (R.T. 795.)

Orr was not entirely sure whether Mr. Moore or some other representative of the Financial Department of Mosher had met with him and Holmes in Dallas. Moore did however testify that he had been called from Dallas by Burton while he (Moore) was in Houston, asking whether Moore would accept the credit (R.T. 354) of IMI-Ward for the reason that *Holmes and Orr had requested that Mosher change the order from Graver to IMI-Ward "as it would be more convenient for accounting purposes."* (R.T. 353.) Moore told Burton that he would accept a purchase order from IMI-Ward "providing that Graver would be responsible for payment" (R.T. 354).

Burton testified that Holmes and Orr arrived in Houston unannounced (R.T. 261) and asked how

Mosher was getting along with the Tucson job and asked if Mosher could fabricate a \$20,000.00 addition for Vandenberg (R.T. 809). Burton told them he would try to interweave the Vandenberg job in with the Tucson job (R.T. 261). When Holmes and Orr asked about the price for the Vandenberg job, Burton suggested that they accompany him to Dallas to talk with Mitchell, in whose department matters of price would come (R.T. 262). They came to Dallas and met with Mitchell.

During the course of that meeting, Holmes and Orr raised the question about changing the customer from Graver to IMI-Ward. Holmes and Orr told Burton and Mitchell that they wanted Mosher to deal with IMI-Ward because:

“* * * it would be much easier and simpler for them, from the accounting standpoint, to have us accept an IMI-Ward purchase order.” (R.T. 264.)

Mr. Burton, from Dallas, then called Mr. Moore in Houston asking whether Moore would accept an IMI-Ward purchase order, and Moore told Burton he would accept such a purchase order:

“* * * as long as Graver would be responsible for payment.” (R.T. 264.)

Burton then informed Holmes and Orr of what Moore had said relative to accepting the IMI-Ward purchase order and the Graver responsibility for payment. (R.T. 265.)

Mitchell confirms the fact that Holmes and Orr advised him that the formal purchase order from Graver would foul up the Joint Venture bookkeeping (R.T. 85) and that it would complicate the bookkeeping, and they asked whether Mosher would accept a purchase order from the Joint Venture in lieu of the formal Graver purchase order (R.T. 85).

Mr. Mitchell identified plaintiff's Exhibit 32 as being notes which he had made on October 31 during the meeting with Holmes and Orr, that he asked them the customer's name and it was given as Idaho-Maryland Industries, Inc., and Ward Industries Corp. (R.T. 88), and that they told him that they represented the Joint Venture of Idaho-Maryland Industries, Inc. and Ward Industries Corp., and asked acceptance of a Joint Venture purchase order (R.T. 89).

Mitchell also confirms that he told Holmes and Orr that the acceptance of the changed purchase order on Tucson and the acceptance of an order for Vandenberg was dependent upon credit approval by Mr. Moore, and that Burton called Moore in Houston and heard Burton advise Holmes and Orr that Mosher would not accept a Joint Venture purchase order unless Graver assured Mosher of payment of all invoices (R.T. 90). Holmes and Orr then informed Mitchell and Burton that they (Holmes and Orr) would check into the matter and let Mosher know (R.T. 90).

Mitchell did not enter any change in the shop order for Tucson, nor did he enter any shop order for Vandenberg at that time (R.T. 90-91). The Tucson shop order was changed and the Vandenberg shop order entered on November 16, 1961. (R.T. 92-93.)

On November 13, Orr called Mitchell and again requested that Mitchell accept the Joint Venture purchase order and Mitchell again stated to Orr that they would have to be cleared with Mr. Moore of the Credit Department who was then in Lubbock (R.T. 91).

The purchase orders (Jt. 9 and 10) were received by Mitchell in Dallas on November 10, 1961 (R.T. 96), and were retained on his desk until the credit was approved on November 16, at which time he forwarded the pur-

chase orders to Houston where they were received on November 17. (R.T. 440.)

Orr testified that Morton had given him a copy of the October 16 letter (Union QQQQ) (Pl. 1) and had stated that the Joint Venture had no contract with Mosher to protect the Joint Venture, and that the *Joint Venture had to get it on contract* (Tr. 803). Orr testified that he had read the October 16 letter at the time he received it before going to Houston (Tr. 803).

Orr testified that he saw someone from the Finance Group in Dallas at the time of the negotiations (Tr. 805). Orr conceded that the terms of the October 16 letter were embodied in the purchase orders, and that the only addition in the negotiations was a \$20,000.00 addition at Vandenberg, and this on the same prices as had been quoted on the Tucson job to Wilson (Tr. 809).

Mr. Orr recalls no conversations on October 13 with either Mr. Mitchell or Mr. Moore. Mr. Orr testified that he left Dallas with the belief that Mosher would accept the purchase orders from the Joint Venture, and that he so informed Vernon John on November 2, and his testimony reveals no knowledge of the transaction after that time.

Mr. Orr testified that the purchase order form in the name of IMI only was the only form which the Joint Venture had at the time (Tr. 825).

Mr. Orr identified the purchase requisitions between the Joint Venture and Denver Steel & Iron as being a work order and:

“* * * nothing more than an internal order giving portions of the work to Iteeco and to Denver Steel & Iron on the work that they were to do in their plants. * * *” (Tr. 848-849.)

He also testified that the purchase requisitions were given to the Government only for the purpose that the Government have information on where to assign Government inspectors. (Tr. 851.)

Orr testified that later on the Joint Venture got a stamp which said "Joint Venture" but at the time when the purchase orders were issued they used the IMI forms for the Joint Venture (Tr. 856), and that he had told the Mosher people in Dallas that he would send a Joint Venture purchase order and had sent the purchase orders (Jt. 9 and 10) pursuant to that understanding. He also testified that the purchase requisitions and the notification to the Government of the various plants involved did not determine the legal relationships of the parties (Tr. 858).

Orr identified Frank J. Wright, who signed the purchase orders, as being "purchasing man from the Joint Venture" (Tr. 863).

George Morton, the President of IMI, was the Manager of the Joint Venture (Jt. 7) (Morton 2, p. 10, Pl. Ex. 40). Vernon John was a member of the Joint Venture Committee (Jt. 7) (Morton 2, p. 11, Pl. 40). Morton described the purchase requisitions as being an internal matter, and said he had arrived at the price as a target under which the various division managers were to operate and was not a price as between IMI-Ward Joint Venture and the Divisions of IMI (Morton 2, page 42, *supra*).

Niels Gammeltoft, *President of Ward*, testified that the work done by IMI on the Tucson and Vandenberg jobs was done *pursuant to the Joint Venture agreement itself*, and that there was no other or further contract between the Joint Venture and IMI (Gammeltoft Dep., p. 136-139, Union CCC(1) and CCC(2)).

Morton also identified Orr as being Director of Contracts for the Joint Venture and Wright as Purchaser for the Joint Venture (Morton 2, page 12), and identified Holmes as working for the Joint Venture, together with Vernon John, who was in charge of the fiscal operation of the Joint Venture (Morton 2, p. 13, *supra*).

George Morton, Manager of the Joint Venture, testified that he saw the Vernon John letter (Jt. 26), shortly after it was written (Morton 2, p. 52, *supra*), and that it constituted a modification of the Joint Venture contract with Union.

George Morton testified that the Vernon John letter authorizing Graver to pay Mosher and to deduct from the Joint Venture contract price contained his understanding of the then situation and of what was to be done (Morton 2, p. 29-30, *supra*). George Morton, Manager of the Joint Venture, testified that Holmes and Orr went to see Mosher with his acquiescence (Morton 1, p. 26, Pl. 39) and that it was brought to his attention that Mosher was requiring a guarantee of the purchase order and that these arrangements had to be made before they would accept the purchase order (Morton 1, p. 27, Pl. 39).

As a result of the above testimony and evidence, Ward's complaint against the Court's Findings of Fact has been restricted to the allegation that statements made by Moore, Mitchell, and Burton on the stand to the effect that Holmes and Orr represented themselves as representing a Joint Venture composed of Idaho-Maryland Industries, Inc. and Ward Industries Corporation was a contrivance, that the purchase orders were on a IMI form and that Mosher's shop orders and billings, which were predicated upon those purchase orders, used the words "Idaho-Maryland Industries" rather than Idaho-Maryland Industries—Ward Industries Corporation Joint Venture, and that Mosher's Treasurer

never relied on the credit of the Joint Venture but, on the contrary, relied on the credit of Union and expected payment direct from Union.

At the trial, *all* of the witnesses, including Orr, testified that Holmes and Orr did represent the Joint Venture at the October 31 meeting, *did so inform* Mosher at that meeting, and that the purchase orders which followed were *intended by Orr* to be Joint Venture Purchase Orders and were *understood by Mosher* to be Joint Venture Purchase Orders. All of the persons with whom Mosher dealt, to-wit, *Holmes, Orr, Wright and Morton*, were representatives of the Joint Venture, assigned thereto by George Morton, who was himself the Manager of the Joint Venture. (Jt. 7.)

Ward was content to offer evidence consisting of "purchase requisitions," and letters to the Corps of Engineers which identified the shops in which the work was being done, to support the proposition that there was a *subcontract* between the *Joint Venture* and *one of its members*, IMI, so that IMI could be considered as having acted *independently* of the Joint Venture. This effort was to *no avail* because both the Joint Venture Manager, Mr. Morton, and the *President of Ward, Mr. Gammeltoft*, testified that there was *no such subcontract*.

IMI acted solely for and on behalf of the Joint Venture, and this fact was contemplated and relied upon by all parties. This is clearly shown by all of the testimony relative to the offer and acceptance of the purchase orders themselves and the testimony surrounding them.

Included within the testimony and documents in evidence relating to the Joint Venture, are several letters received by Mosher which bear Joint Venture identity, *the purchase orders themselves (Jt. 9 and 10) refer to the Joint Venture in several places, and the notation made by Mr. Mitchell on*

October 31 identifying the Joint Venture (Pl. 32) was actually part of the *res gestae*.

Ward's attack on the conclusiveness of the above mentioned testimony and evidence is restricted to reciting certain *small parts* of the depositions of Moore, Burton and Mitchell in which the word "IMI" without the additional use of the word "Ward" was used by the witnesses. Many of these references, as might be expected, are found in the *questions* rather than in the *answers*, and where the witness *was not aware from the question that he was being called upon to distinguish between "IMI" and "IMI-Ward."* An effort is made to quote *one sentence* of an Affidavit (Ward Exhibit F) in which "Idaho-Maryland Industries Inc." appears, without adding *another part* of the Affidavit in which the Joint Venture is mentioned. The Miller Act letter to Fluor (Pl. 24) dated March 19, 1962, long before any depositions were taken, claims a contract with the Joint Venture.

Thus, it is falsely sought to give the impression that use of word "Ward" was unknown to the Plaintiff and did not appear in the record prior to trial. In introducing *other parts* of the depositions of Mosher's witnesses, to prove *other* contentions, Union and Ward introduced testimony *taken upon deposition* which dispells the impression of afterthought sought to be conveyed, as follows:

Moore *Deposition*, page 16 (Union UUUU), which refers to the October 31 meeting:

"Q. What did you tell them?

"A. I told Burton that we would not substitute *IMI-Ward* for the Graver contract without assurance from Graver—"

and at page 17:

"Q. And what was that previous information?

"A. I had been informed right from the very beginning that those they were dealing with stated that the credit was no good for *IMI-Ward Venture*."

When the question was put in such a way that the witness could fairly understand that the question was *whether* it was the *Joint Venture or IMI alone* which was involved, the witness *on deposition* answered very clearly, as follows:

“Q. Well, did you understand the request Mr. Burton made as being a request for you to take this joint venture, IMI-Ward, as the customer?

“A. Yes.

“Q. Not just IMI alone?

“A. *I understood it was a joint venture.*

“Q. Were you ever at any time under the impression that you were dealing with IMI as the subcontractor for the joint venture?

“A. *I was never under that impression, no.*”
(Moore Deposition, pages 15-16)

In the short excerpts from the depositions cited by the Defendant Ward, in which the “Ward” was left off as an attachment to “IMI” where the question was not directed to *distinguishing* between “IMI” and “IMI-Ward”, the witness sometimes used “IMI” in the same way in which one might say “Boyle, Bilby” in referring to the firm of Boyle, Bilby, Thompson and Shoenhair. Wherever the witness on deposition was asked to *distinguish* between the *partner* and the *firm* on the subject of the entity with whom Mosher dealt, the answer was clearly the *firm*, to-wit, *IMI-Ward*.

With respect to Ward’s second contention that the fact that the purchase orders were on a printed form of IMI’s rather than IMI-Ward, and that Mosher’s Shop Orders and invoices mentioned Idaho-Maryland Industries and not Ward, all that can be said is that these matters are the sole and only evidence in the record which seems, on its face, to conflict with all the testimony. The fact that the pur-

chase orders were an IMI printed form certainly *accounts for the fact* that the matter was entered under *that name* in the Shop Order and, *therefore*, on the *invoices*. The Joint Venture, of course, had the *same address* in California as did Idaho-Maryland Industries, Inc.

Mr. Orr testified that the IMI printed forms were used because no Joint Venture printed forms were available.

This is doubtless true. In addition, the truth is, the various persons involved who were employees of IMI, and also assigned to the Joint Venture, clearly considered, that insofar as the Joint Venture work was concerned, Idaho-Maryland Industries, Inc. and the Joint Venture were one and the same. It is not surprising that Mosher would have been unaware of any distinction after the meeting of October 31, merely because the printed purchase orders were on the IMI form, *especially* where the *Joint Venture* was *specifically mentioned* several times in the *purchase orders*. (Jt. 9 and 10.)

Why did the IMI-Joint Venture personnel fail to distinguish? Because IMI, in the performance of the missile base projects, was acting at all times for, on behalf of, and *as* the Joint Venture under the Joint Venture Agreement.

Ward's final contention that Mosher refused to, and did not, *rely on the credit* of the Joint Venture or *expect to be paid by it*, is absolutely true from the record, but this does not mean that Mosher did not regard itself as being *obligated to the Joint Venture* to perform the work embodied in the Joint Venture Purchase Orders *nor* that Mosher had agreed to *release* the Joint Venture from its obligation to pay for the work which it had ordered done, nor that Mosher relied only on the credit of Union.

It is absolutely clear that the credit of the Joint Venture alone was not acceptable to Mosher and it was for this reason that Mosher refused to accept the purchase orders

of the Joint Venture unless Graver would be obligated to Mosher for payment. Having turned down the credit of the Joint Venture alone, and having obtained *Graver's promise to pay direct*, with the understanding that the *Joint Venture had agreed that Graver would pay direct*, it is quite obvious that Mosher *expected* payment from Union. This is *not* to say thereby Mosher had forfeited or intended to forfeit the obligation of the Joint Venture to pay Mosher for the work done by Mosher pursuant to the Joint Venture Purchase Orders.

Though *the Treasurer of Mosher relied upon Graver for payment*, Mosher *did actually perform the services required by the Joint Venture Purchase Orders*. That the Treasurer of Mosher, under the credit circumstances and the agreements which he had made and had been made for Mosher's benefit, did not *expect* payment from the Joint Venture because he *expected* it direct from Union can under no circumstances lead to the conclusion that there was no contract between Mosher and the Joint Venture under the Joint Venture Purchase Orders, or that the Joint Venture is not liable for payment thereunder.

In this case, we not only have a contract between Mosher and the Joint Venture, but we have *no* Mosher agreement to look *solely* to Union for payment. An agreement that Union would pay Mosher and the expectation of Mosher's Treasurer that payment would be made by Union does not constitute an agreement by Mosher that the Joint Venture owed it no contractual duty, regardless of what rights and duties may have resulted as between the Joint Venture and Graver.

There is nothing whatever in the record to indicate intent upon Mosher's part that the Joint Venture would not be liable for payment for the work done under the Joint Venture Purchase Orders. Nor is there anything in the record

indicating any understanding on the part of the Joint Venture that it was not to be liable to Mosher for the payment of Mosher's work. In fact, when Frank Wright, the Joint Venture's Director of Purchases, discovered, belatedly, on January 5, 1962, that Union would not pay Mosher invoices direct, and that they should be processed through the Joint Venture's Accounts Payable Department, he proceeded to turn the invoices over to the Joint Venture's Accounts Payable Department and asked Harle's permission to put the Mosher work "on a JV requisition to Graver to insure prompt payment." (See memorandum from Frank Wright to Tom Harle dated January 5, 1962, Pl. 28, Union P.)

In citing cases to the Court under its Point I, Ward seems to take the position that the fact that Mosher demanded and received credit of Union constitutes in some way an agreement by Mosher with Ward that Ward would not be liable, but only Union. As stated above, there is no testimony or evidence, or any inference which can be drawn therefrom, which substantiates Ward's position.

For this reason, the cases recited at length in Ward's brief, even in the statement of them presented by Ward, are not in point.

In the first case, *Colorado National Bank of Denver v. Boehm*, where a promissory note to a mother had been executed by Boehm and also by the mother's son, Joseph, the Court found that Boehm's "—signature on the note was given solely in exchange for her promise that he would not be held liable on the note; hence there was no consideration which could make this note enforceable against appellee." (Ward's brief, p. 56.) That is a pretty clear case of inability to enforce a promise where the sole consideration for the promise was that it would not be enforced, but it is certainly not pertinent to the case at hand.

Next, Ward cites statements of general principle in the *Wickham* case and the *Powers* case, that a mere fortuitous or accidental result from an agreement is not esteemed a legal consideration. (Ward's brief, p. 56.) Ward then cites *Dougherty v. Salt*, in which the Court held that a promissory note delivered by an aunt to an eight year old nephew was intended to be, and was, "a bounty." (Ward's brief, p. 58.)

Finally, under Point I Ward cites by the Supreme Court of Massachusetts a quotation from *La Chance et al v. Rigoli et al*, 91 N.E. 2d 204 (1950), the ringing statement that

"The contracting party must look for payment to the one to whom credit was extended when the work was done, that is, the one who was expected to pay—"

A glance at the case itself reveals that the plaintiffs had entered into a written contract with a tenant to construct a building on land owned by the Cyr Oil Company. While the Cyr Oil Company assented to the erection of the buildings on its land, it had no contractual contact with the plaintiffs at all, and

"The builders (plaintiffs) were never given to understand from or by the owner or its agents that said owner was to be held accountable or liable for any charge or charges for the erection of said filling station." At page 205.

The Court went on to hold

"There is no legal presumption arising from ownership that the owner of the fee is liable for repairs on his buildings—"

Under the circumstances, the extracted quote from the case is certainly logical, and doubtless correct, but certainly is not authority for Ward's position in this case.

Ward seems to take the position that just because Mosher required and received an obligation by Union in view of Mosher's unwillingness to accept the credit of the Joint

Venture alone, this constitutes, as a matter of law, a release of the Joint Venture's obligation, otherwise wholly obvious, to pay for the work which it had ordered from Mosher in its purchase orders. There is no testimony or evidence to support any agreement by Mosher in this connection, so Ward takes the position that, as a matter of law, the release of Ward necessarily follows as a result of the obligation of Union.

This, of course, is not the law in any jurisdiction.

In Illinois, a case very similar on the facts to the case at hand is *Granite City Lime and Cement Company v. The Board of Education of School District No. 126 et al.*, 203 Ill. App. 134.

In that case one Beale (prime contractor) entered into a contract with the Board of Education of School District No. 126 (owner) for the erection and completion of a high school building. Thereafter, Beale entered into a subcontract with Mettlen to furnish building material and brick work for an expressed consideration. Thereafter, Mettlen placed an order with the plaintiff for the necessary brick and other building material. After Mettlen had placed the order, and before any material had been delivered, plaintiffs learned that Beale and Mettlen had agreed that Beale would pay for the materials furnished and the Chancellor found that Beale agreed, before the material was delivered, to pay for it, and that the material was furnished upon the strength of the promises of Beale. Despite the facts that *plaintiffs delivered the materials to Mettlen and recognized Mettlen as subcontractor and charged the goods to Mettlen upon their books*, nevertheless, the promise of Beale was held to be an original undertaking, and Beale was liable upon such promise.

It is interesting to note that the plaintiffs sued the Board of Education, Beale, and Mettlen. A judgment was granted against all the defendants and Beale appealed. It was also

contended by Beale that, the materials having been furnished to a *subcontractor* under the mechanic's liens statute, the plaintiffs had no right to a lien upon the building. The court found that the mechanic's lien was properly available to the plaintiff under the circumstances. The court said:

“* * * It does appear from the evidence in this case that after the contract was made between Beale and Mettlen & Company and after Beale had promised that he would pay for the materials furnished, that Mettlen & Company did give orders to appellees (plaintiffs) upon which they received payment, and that when appellees gave their first notice they referred to Mettlen & Company as subcontractors and did other things by which they recognized Mettlen & Company as subcontractors, *but if they had a contract with appellant that he was to pay for the materials furnished, the mere fact of their having recognized Mettlen & Company as subcontractors afterwards and that the goods were charged to Mettlen & Company upon the books of appellee would not necessarily deprive them of their rights under the promise of Beale to pay for the materials.*

* * * * *

“After a careful consideration of all of the evidence, facts and circumstances in this case, we are of the opinion that the Circuit Court was warranted in finding that under the agreement and conduct of the appellant (Beale) that *there was an implied request upon his part to furnish the building material that was furnished and used in the construction of the building, and that the appellee and the said McEwing & Thomas Clay Products Company are entitled to their lien under this statute, and the decree of the lower court is affirmed.*”

A case directly in point as to whether the law requires Mosher to rely *alone* on the credit of IMI-Ward is *Peters v. Raven*, 159 Ill. App. 122. This is a very informative case. The facts were that the *plaintiff* entered into a contract to

deliver merchandise to one Grage. Thereafter Grage told the plaintiff to seek payment from the defendant Raven, and Raven told Peters (the plaintiff) that he would pay all bills for goods delivered to Grage. Peters continued to deliver goods to Grage and charged the same to Grage.

It appeared that Raven held a mortgage upon Grage's property. The trial court instructed the jury that it could find for the plaintiff only if the plaintiff "furnished and supplied goods, wares, merchandise and labor to said Grage, intending to hold Raven *alone* responsible * * *" and that if " * * * plaintiff did not rely *alone* upon the promise of Raven * * *" it must find for the defendant.

The case was *reversed* and *remanded* on the ground that the *instruction* to the jury was *erroneous*. The court stated the law of Illinois as follows:

"In our opinion the instruction is clearly erroneous as applied to the facts shown by the evidence. If, by reason of holding a mortgage upon Grage's property of \$4,000 or otherwise, Raven *was interested in the business and primarily to protect his own interest* promised to pay for any goods sold, delivered to, or repairs made for, Grage thereafter, *it was an original undertaking and not merely a collateral promise to pay the debt of Grage, and it would not be necessary to its validity that Peters in selling the goods and making the repairs should have intended to hold Raven alone responsible for such goods and labor. A PROMISE SO MADE BY RAVEN WOULD BE NONE THE LESS AN ORIGINAL UNDERTAKING BECAUSE GRAGE ALSO BECAME INDEBTED.*"

There are many cases holding that the obligation of a person to pay a debt which is also owed by another person in these circumstances, neither requires nor assumes the release of the other person, for example, in *Rothermel v. Bell and Zoller Coal Co.*, 79 Ill. App. 667, it was held that an oral promise by an individual to pay a company's debt

was valid, notwithstanding the company had been released by the creditor, for the reason that it was sufficient consideration for the promisor's undertaking and that the creditors could take advantage of his agreement made for their benefit but not releasing their claims against the original obligor.

Again, in *Holmes v. Suffrin*, 198 Ill. App. 45, it was held that "a valid oral promise may be made with regard to the debt of a third person without releasing the original debtor." Again, in *Lusk v. Throop*, Supreme Court Illinois, 59 N.E. 529, the taking of security from a sub-contractor did not relieve the contractor of a promise to pay for materials delivered to the sub-contractor. In *Lusk v. Throop*, the Supreme Court of Illinois held that there was nothing in the transaction which necessarily required that either obligor be released in order to bind the other obligor in these circumstances, stating that it was a question for the jury to determine whether the Plaintiff intended, by taking the notes and mortgages from the sub-contractor thereby to release the contractor. In our case the trial court has found no intent on Mosher's part to relieve the Joint Venture of its responsibility to Mosher under the Joint Venture purchase orders.

Virtually all of the cases following the "main purpose rule", cited in Appellee's response to the brief of Appellant Union, presuppose the continuing obligation of the original obligor even under circumstances where an oral promise in terms to answer for the debt of the original obligor has been held, because of the main purpose rule, to be direct, rather than collateral.

Thus all the cases support the basic proposition found in the *American Law Institute, Restatement of the Law of Contracts*, in which validity is confirmed for contractual situations in which two persons are separately obligated

to the same person for the same performance and one person is obligated to two separate persons for one performance. (*ALI Restatement of the Law of Contracts, Vol. 1, Sec. 111, Page 130, Sec. 113, Page 131 and Sec. 128, Page 146*)

RESPONSE TO POINT II

The Performance For The Joint Venture Under The Joint Venture Purchase Orders Was Not The Performance Which Mosher Was Already Legally Bound To Perform, Because At The Time Mosher Agreed And Performed Under The Joint Venture Purchase Orders, The Joint Venture And Union Had Requested That Performance Be Made Under Those Purchase Orders And These New Agreements Relieved Mosher Of Its Duties Under The Interim Purchase Order With Union (Pl. 1).

Under Point II, Ward cites numerous cases for what it describes as the "textbook learning" that a promise to perform that which one is already legally bound to perform cannot constitute a sufficient consideration for a subsequent promise.

In citing these cases as being applicable to the facts, Ward misreads and misinterprets not only the position of Mosher but the position of the Court in its Findings of Fact and Conclusions of Law. Mosher did not sue on, or obtain a judgment against Union in this proceeding on the basis of the oral contract made on October 13, 1961, or the Letter Agreement dated October 16, 1961, which constituted an interim purchase order for the Tucson work between Mosher and Union. The significance of the oral agreement and the interim purchase order of October 16, 1961 is simply that, at the time when the intervention of the Joint Venture, insofar as the Tucson was concerned, and the addition by the Joint Venture of the Vandenberg work, occurred, Mosher considered itself bound under the October 16 interim purchase order and had commenced performance thereunder, but as a result of the intervention of the Joint Venture

requesting that Mosher accept the Joint Venture Purchase Orders in lieu of the expected formal Graver purchase order, and the agreement of Union to pay Mosher for the performance prescribed by the Joint Venture Purchase Orders (Jt. 9 and 10), Mosher, Union, and the Joint Venture all agreed that no formal purchase order would be forthcoming from Union, and that Mosher would perform, instead, under the Joint Venture Purchase Orders with Union's agreement to be responsible for payment.

Thus, at the Joint Venture's own solicitation, a new contractual relationship was created with Union's consent, so that Mosher was necessarily relieved of its duties under the October 16 interim purchase order and became obligated under the Joint Venture Purchase Orders and the agreement with Page that if Mosher would so perform, Union would pay Mosher.

This being the case, the "textbook learning" cited by Ward, while hallowed, has nothing to do with the case.

Insofar as the contractual relationships upon which suit has been brought, and upon which judgment has been granted, are concerned, the acceptance by Mosher of the obligations embodied in the Joint Venture Purchase Orders was coincidental with the obligation between Union and Mosher for payment for Mosher's performance under those purchase orders.

RESPONSE TO POINT III

Mosher Did Not Extend Credit Or Deliver Goods To IMI, But To A Joint Venture Composed Of IMI And Ward.

In presenting recitations of the testimony and evidence in this brief, it has been shown, and the Court has found, that at all times Mosher dealt with the Joint Venture composed of IMI and Ward rather than with IMI individually, and that those who dealt with Mosher on behalf of the

Joint Venture acted for the Joint Venture rather than for IMI individually. The Trial Court has so found upon a preponderance of credible testimony and evidence. It would appear that these Findings by the Trial Court would have relieved Appellant Ward of the necessity of reciting the law relating to joint ventures as distinguished from partnerships, and the law relating to contracts with an individual partner where the contracting party elects to do so.

In its argument Ward quotes certain fragmentary parts of the Joint Venture Agreement, citing it to the record as Joint Exhibit 8. Appellee's list of Stipulated Exhibits indicates that it is Joint Exhibit 7.

For example, in quoting paragraph 2 of the Joint Venture Agreement, Ward states that the "IMI-Ward subcontracts will be entered into in the names of the parties hereto as joint venturers," but it fails to quote the immediately succeeding language that "and their obligations thereunder shall be joint and several and all money, equipment, material, supplies and other property of any nature whatsoever required for or in connection with the performance of the IMI-Ward subcontracts shall be held for the account of IMI-Ward, the Joint Venture."

Again under paragraph 7 of the Joint Venture Agreement, Ward neglects to recite "that the committee may assign the performance of certain minor portions of the work to Ward," and that "The work and services performed by either IMI or Ward shall be done on the basis of the assumption and reimbursement by the Joint Venture of the actual costs of such work, including overhead and general administrative expenses, but shall not include any provision for profit."

In paragraph 8 of the Joint Venture Agreement, the quotations regarding its financing refer, of course, to bank

loans necessary to the meeting of payrolls, etc. required by the Joint Venturers in performing that part of the work to be done in their own plants.

Finally, Ward quotes a statement in paragraph 9 of the Joint Venture Agreement to the effect that neither the committee nor either party shall have the power to borrow monies or pledge the credit of the other party to this agreement or on their joint credit, *except as herein provided*. Ward neglects to recite the matters which come under the heading "except as herein provided." The "except as herein provided" clause includes all matters relating to the performance of the Joint Venture subcontracts from Union, and in so doing, not only were all obligations joint and several, pursuant to paragraph 2, all money, material, etc. used therein held by the Joint Venture under paragraph 2, and all monies related thereto declared "to be trust funds." (paragraph 10.) But, of course, under paragraph 6 the work under the IMI-Ward subcontracts was to be managed by a Joint Venture Committee under the supervision of George J. Morton as Manager, with full authority to commit or bind the Joint Venture in commitments related to the normal performance of the Joint Venture contracts (paragraph 6).

Under the Joint Venture Agreement, it is immaterial whether, under the law of New York a joint venture is, or is not, the same as that governing partnerships, although under the record in this case and the Findings of Fact by the Trial Court, it is obvious that if the Joint Venture is in legal effect a partnership under the law of New York, the Joint Venture Partnership, if that it be, would clearly be bound.

In fact, it was not contemplated by, nor permitted by the Joint Venture Agreement, that either IMI or Ward, in the

performance of the work embodied in the contract with Union relating to Tucson and Vandenberg could act individually, since they had agreed that all of their obligations for the performance of the work would be joint and several, and all their money, materials and every other thing used in the prosecution of the work were "trust funds" dedicated to the work.

In the last few pages of its brief, Ward again disputes the facts as found by the Trial Court and again argues the importance of certain facts, and ignores others, all of which matters have been raised before and found against Ward by the Findings of Fact, and, like Union, in Union's brief, raises the spectre that the fact that Mosher obtained certain shares of stock in the arrangement confirmed in the IMI Chapter XI Reorganization, every penny of which has been credited to Ward in the judgment, nevertheless deprives Mosher of its claim against Ward.

In so doing Ward does not even quote a single passage from the Proof of Claim filed by Mosher in the IMI Chapter XI proceedings. The Court is respectfully referred to Appellee's argument with respect to the Chapter XI proceedings and Mosher's declarations and reservations against Ward as joint venturer with the Debtor. In its Proof of Claim, in the Stipulations with the Attorney for the Debtor, and in the Bankruptcy Judgment itself, the declaration and reservation even refers the Bankruptcy Court to the specific number of the suit in Arizona, which is the subject of this appeal. The final statement that the claims of the individual creditors of IMI were diminished by the distribution of stock made to Mosher in the Chapter XI proceedings is not substantiated by the record, and Ward makes no reference to the record in its gratuitous accusation.

CONCLUSION

Based upon the trial court's findings of fact which are amply supported by a preponderance of the evidence, and the rules of law applicable to those facts, as set forth in this brief, Appellee Mosher Steel Company respectfully prays that the Judgment entered on May 4, 1966 by the United States District Court for the District of Arizona, sitting at Tucson, Arizona be affirmed as to Appellant Ward Industries Co., Inc. (save for the denial of pre-judgment interest) and Appellee further prays that it be awarded its costs of suit.

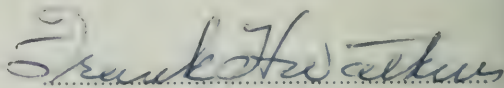
Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


Frank H. Watkins, *Attorney*

No. 21307

In the

**United States Court of Appeals
FOR THE NINTH CIRCUIT**

FLUOR CORPORATION, LTD., et al
UNION TANK CAR COMPANY
WARD INDUSTRIES CORPORATION,
now known as
DRAGOR SHIPPING CORPORATION,

*Appellants,
Cross Appellees,*

v.

U.S.A., Ex REL MOSHER STEEL COMPANY,
*Appellee,
Cross Appellant.*

No. 21307
No. 21307A
No. 21307B
No. 21307C

**BRIEF OF APPELLEE MOSHER STEEL COMPANY
RESPONDING TO APPELLANT UNION TANK
CAR COMPANY**

FILED

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No. 21307
In the
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UNION TANK CAR COMPANY
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now known as
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Appellants,
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Appellee,
Cross Appellant.

No. 21307
No. 21307A
No. 21307B
No. 21307C

BRIEF OF APPELLEE MOSHER STEEL COMPANY
RESPONDING TO APPELLANT UNION TANK
CAR COMPANY

JURISDICTIONAL STATEMENT

The jurisdiction of the court below with respect to Mosher's¹ claim for relief against Union was based on diversity of citizenship, the amount in controversy exceeding \$10,000 (28 U.S.C. 1332). Mosher is a Texas corporation having its principal place of business in the State of Texas

¹ The following terminology and abbreviations as used in the trial court are employed in this brief: Union and Graver are one and the same; Joint Venture is the same as IMI-Ward; "R"—Record on Appeal; "RT"—Reporter's Transcript; "Jt."—a stipulated joint exhibit; "Pl."—exhibits introduced in evidence by Mosher; Ward and Union exhibits, respectively, identified by Ward and Union.

(R. 268, 1220). Union is a New Jersey corporation having its principal place of business in the State of Illinois (R. 272, 1221).

In addition, jurisdiction with respect to Union under Count I of the Amended Complaint exists by virtue of Section 270 A and B, Title 40 U.S.C., commonly known as the Miller Act. Jurisdiction of this court is invoked by Appellant pursuant to 28 U.S.C. §§ 1291 and 2107, and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The court will discover in reading the briefs of Appellants Union and Ward in this cause that, throughout the trial of the case and the briefs on appeal, both Appellants attempted to greatly complicate and confuse the fact situation upon which the trial court has rendered its judgment, in an effort to place Appellee Mosher between Scylla and Charybdis, so that if Mosher escapes the legal pitfalls dug by one, it necessarily plunges into the legal pitfalls dug by the other. Indeed, both Appellants at times attempt to so confuse the issue that their efforts would result in the proposition that Mosher was not entitled to collect its undenied losses at all, not because it had not dealt with either, but because it had dealt with both. In Union's and Ward's briefs a rather simple, and clearly understandable, business relationship is twisted by each Appellant in turn to the point where the brain sometimes reels in confusion. In so doing, the Appellants largely ignore the trial court's Findings of Fact, which are both complete and chronological, and which resolve conflicting testimony consuming nine days of trial, a thousand pages of reporter's transcript, a dozen depositions, and a hundred exhibits.

The actual contractual relationship shown by the facts is simple, as follows: At the outset Union, through its Graver Division, obtained subcontracts from Fluor for the

Tucson work and Matich Bros. & Sundt for the Vandenberg work. Union in turn entered into a contract with a Joint Venture, composed of Idaho-Maryland Industries, Inc. and Ward Industries Corporation for the performance of certain work which it was later concluded the Joint Venture could not wholly perform within the time required. Thus certain portions of the Joint Venture's work were ordered by Union to be sent elsewhere. Insofar as Mosher is concerned the matter commenced by a negotiated agreement between Mosher and Union for the performance of a part of that work which the Joint Venture could not perform for the Tucson job. This agreement by Mosher with Union (rather than with the Joint Venture) was occasioned by the fact that Mosher would not accept the credit of the Joint Venture. Upon learning of Mosher's prices, which were less than the Joint Venture's prices to Union for the same work, George Morton, manager of the Joint Venture did not like the fact that Mosher would contract with Union directly as to work which the Joint Venture had already agreed to perform under its contract with Union, because the Joint Venture had a profit in the price of steel fabrication in its contract with Union, over and above the price which Mosher had agreed to charge Union.

As a result, the Joint Venture approached Mosher in an effort to have Mosher cancel its initial agreement with Union and accept purchase orders for the same work on the Tucson job from the Joint Venture and in addition a small amount of work for the Vandenberg job.

Mosher took the position that it would accept the Joint Venture purchase orders and accede to the request of the Joint Venture, but only if Union would be responsible to Mosher for payment.

As a result of these demands by Mosher, the Joint Venture and Union then agreed that Mosher could accept the Joint Venture purchase orders and accommodate Union

and the Joint Venture by so doing and by billing the Joint Venture for its accounting convenience, and that Union would reduce the dollar amount of the Joint Venture-Union subcontract and pay Mosher *direct* after the materials were received by the Joint Venture and Mosher's billing had been checked out and approved by the Joint Venture. Union then agreed with Mosher that it would pay Mosher direct and deduct the payments from the contract price between Union and the Joint Venture.

Once the Union obligation was received, Mosher proceeded to fully perform the tri-partite agreement by fabricating the materials and delivering them pursuant to the Joint Venture purchase orders, relying, under the agreements, upon payment direct by Union.

But neither Union nor Ward (as a member of the Joint Venture) has paid Mosher, hence this suit of incredibly voluminous record.

Because of the necessity of detailed billing on the basis of sites and levels in the Missile projects, the Mosher invoices so billed were received by the Joint Venture shortly before IMI., one of the joint venturers, entered Chapter XI proceedings in Los Angeles. Once the Chapter XI proceeding was filed, both Ward, as a member of the Joint Venture, and Union began a vast series of disputes and litigation between themselves, each pointing the finger at the other in connection with the Mosher claim, but in so doing attempting through allegations of inconsistency to enmesh Mosher in a morass of legal bars. The plain truth of the matter is that Mosher's position before and during this suit has never changed, and the facts upon which the trial court has found agreements have consistently appeared from the very outset.

In short, Mosher's position is, and the Court has found, that, based upon ample consideration, both Ward, as a mem-

ber of the Joint Venture, and Union, are each obligated to Mosher, regardless of the positions which Union and Ward have taken, as between themselves, in other litigation and settlements.

Many of the points argued and cases cited in Appellants' briefs apply to side-street and tangential issues which are not involved in this case, but which Appellants have sought to create through distorting or denying the simple fact situation which the trial court has found.

The basic principle of law here involved is the undisputed law of contracts that two persons may validly make, and be bound by, a separate promise that the same performance shall be rendered, and a single person may validly promise the same performance to two parties. This is what has happened under the facts of this case, that is, Union and Ward each obligated itself to pay Mosher, each for its own purposes, and Mosher promised and performed the same performance to both Union and Ward, to-wit, the furnishing, fabricating and delivery of the material for Tucson and Vandenberg.

Union's Statement of the Case contains numerous statements which are not supported by the record, and others which are fragmentary references to the record, some of which are in conflict with the Findings of Fact of the Trial Court; some of which are pertinent, and some of which are not pertinent to the Specification of Errors upon which Union's appeal is predicated. In its very first paragraph Union states that it paid the Joint Venture for the steel fabrication work performed by Mosher. There is nothing in the record to sustain such a statement. In addition, it is immaterial in so far as Union's obligation to Mosher is concerned.

Another example is the statement that Sam Wilson had no authority to negotiate the issuance of a Graver purchase

order to cover Mosher's material fabrication, and that the trial court had rejected the Finding that Union had authorized or ratified Wilson's actions in negotiating with Mosher for the Graver purchase order. Both such statements are refuted by Findings of Fact 20 (R. 1226) and 25 (R. 1227). The statement on page 10 of Union's brief that that Orr and Holmes, representing the Joint Venture, left the meeting on October 31st with the understanding that Mosher would undertake the work on Joint Venture purchase orders is not consonant with the Trial Court's Finding of Fact No. 29 (R. 1228 and 1229).

The entire sequence of events between November 7th and November 15th is omitted from Union's Statement of the Case, and words not found in the reporter's transcript are inserted, such as the word "assuring" in the statement of Moore's requirement that Graver be responsible for payment on page 11 of Union's brief, the insertion of the words "Davis-Monthan order" on page 13, and the assertion that Moore's conversation with Page related solely to the Davis-Monthan job contained on page 14 of Union's brief. In addition, the words "final approval" are inserted in connection with the letter which Page's telegram and telephone conversation indicated Page was to send Moore in lieu of the words "complete details" on page 23 of Union's brief.

It is respectfully submitted that an understanding of the facts of this case and the distortions contained in Union's brief can best be had by reading the trial court's comprehensive findings. In addition, since Union has seen fit to rehash the facts as if the trial had never occurred, Appellee will refer to the testimony and evidence where appropriate in its argument in response to Union's points of error.

APPELLEE'S RESPONSE

Of the seven points of error urged by Union in its brief, Union argues Specifications of Error No. 1, No. 2, No. 3 and No. 4 under one heading as Point 1. Ensuing Points 2, 3

and 4 cover Specifications of Error 5, 6 and 7, respectively. Appellee's Response will, for the convenience of the Court, be presented in the same manner.

ARGUMENT

RESPONSE TO POINT I.

The court was *correct* in holding that "Page's telephone conversation with Moore on November 15, 1961 and his telegram to Moore of the same date, together with Mosher's resulting action on November 16, 1961 and subsequently with relation to joint exhibits 9 and 10 in evidence constituted a contract and had the legal result of obligating Union to pay Mosher directly for all sums becoming due to Mosher under the terms and provisions of joint exhibits 9 and 10 for furnishing, fabricating and delivering steel to the Tucson and Vandenberg jobs" (Conclusion of Law No. 6, R. 1238).

Summary of Argument

The Trial Court has properly found on a preponderance of the evidence and in resolution of conflicting testimony that the November 15 Page-Moore telephone conversation and the performance of Mosher in proper reliance thereon, constituted a valid contract whereby Union became obligated to pay Mosher for all work performed under the Joint Venture Purchase Orders at both Davis-Monthan and Vandenberg. The Trial Court has further properly found that this oral contract was complete, and included the entire work embodied in the purchase orders, and that such promise was not only in its terms, direct, but was also direct under applicable law in Illinois and all the other States. The mere fact that the Joint Venture also became obligated to Mosher renders Union's obligation no less binding and no less direct. Under the facts, also, Union is, in any event, estopped from raising the contention that a letter agreement was a condition precedent to the contract, because, under the cir-

cumstances found by the Trial Court on ample evidence, to do so would permit Union to perpetrate a fraud upon Mosher.

In its Point I, Union assails the trial judge's Findings of Fact and Conclusions of Law by assailing first the court's Findings of Fact No. 35 and No. 39 as being "unsupported by any substantial evidence,"; being "contrary to undisputed and documentary evidence," and being "in substantial part statements of erroneous legal conclusions rather than findings of fact." Union then attacks the court's Conclusion of Law No. 6 (R. 1238) in its Specification of Error No. 2, the court's Conclusions of Law Nos. 6, 7 and 11 in its Specification of Error No. 3, and the court's Conclusion of Law No. 7 in its Specification of Error No. 4.

In order that the court may fully understand the circumstances which resulted in the trial court's Findings of Fact and its Conclusions of Law, and the overwhelming evidence which supports them, Appellee believes that it is necessary that the chain of evidence be presented in chronological order so that the court will be aware of all the surrounding facts and circumstances involved.

Prior to October 13, 1961, Union had obtained a subcontract from Fluor in the amount of \$16,500,000.00, for a part of the construction of the Tucson Missile Base Project. It had, on July 28, 1961, executed a Letter of Intent with IMI-Ward whereby a certain part of the Union subcontract was let to IMI-Ward Joint Venture for the sum of \$7,971,000.00, less the cost of Graver supplied materials.

Prior to the execution of the subcontract between Union and the Joint Venture, which was executed on October 23, 1961, and while Union and the Joint Venture were operating under the Letter of Intent dated July 28, 1961, Union's officers concluded that the Joint Venture could not perform the work within the time allotted and, in September of 1961, Mr. Root, the President of Graver, Mr. Lancaster, the

Vice President of Graver, and Mr. Harle, Director of Purchases and Expeditior for Graver on the Tucson job, met with George Morton, the Manager of the Joint Venture in Los Angeles, to determine how best to expedite the job, (Morton Dep. p. 12, P1. 39) and Morton was told by Graver's officers that Graver would guarantee any of the contracts which the Joint Venture had to put out to others for the purpose of getting on schedule (Morton P1. 39, p. 23). S. A. Wilson, Manager of the Denver Steel and Iron Works Division of IMI, was informed of Graver's commitment to guarantee the contracts which the Joint Venture put out to others at Graver's request, in order to get on schedule (Morton, P1. 39, p. 25).

In the last week in September 1961, Lancaster and Harle came to Wilson's office in Denver and insisted on an improved delivery schedule (R.T. 185), and on October 10 or 11, 1961, Harle and Lancaster issued instructions to Wilson to place some of the work in other plants (R.T. 185).

Pursuant to this directive, Wilson called Mitchell, Plaintiff's Senior Contracting Engineer at Dallas, and arranged to come to Dallas to meet with Mitchell with respect to the fabrication and furnishing of steel which had theretofore been assigned to the Denver Steel division of IMI.

Preparatory to going to Dallas, Wilson told Harle and Lancaster that he didn't believe Mosher would take an IMI purchase order, and asked permission to give Mosher a Graver purchase order (R.T. 187), and Lancaster told Wilson that a Graver purchase order would be forthcoming (R.T. 188). There is nothing in the record which disputes Wilson's testimony as to Wilson's authority from Lancaster, who was Vice President of Graver in charge of the Tucson Project.

Prior to that time, at a meeting in the office of Graver in Chicago on June 9, 1961, Messrs. Root, Lancaster, Morton and Wilson had set up the procedure for handling the raw

material and other purchases on the job (R.T. 231), pursuant to which Wilson negotiated for the purchase of steel for the job and:

“ . . . always negotiated on the basis that Graver Company would issue the purchase order. This was necessary because of credit reasons.” (R.T. 232—also R.T. 222.)

As Director of Purchases, Harle issued purchase orders for Graver (R.T. 905), and Harle would probably have issued any formal purchase order by Graver to Mosher which Wilson had negotiated. (R.T. 911).

On Friday, October 13, 1961, Wilson went to Dallas and negotiated with Mitchell all of the terms, prices and conditions of a contract for the fabrication, furnishing and delivery of steel by Mosher for the Tucson job. Wilson told Mitchell and Burton (who was Plaintiff's Vice President in Charge of Production), that a Graver Purchase Order would be forthcoming (R.T. 188, Wilson) (R.T. 247, Burton). Burton testified that Mitchell asked Wilson who the order would be entered to and Wilson said that it would be entered to Graver because he knew that Mosher would not accept the credit of Denver Steel & Iron or IMI. (R.T. 247)

Mitchell, on October 13, called Moore (Plaintiff's Treasurer and Credit Manager), and Moore approved the credit of Graver (R.T. 248-9).

Wilson departed Dallas and on the following Monday, October 16, 1961, Mitchell reduced to writing the agreement which had been made on October 13, referring to such oral agreement and memorializing it. This letter incorporated the fact that the agreement of Mosher had been with Graver and that the letter would serve as an interim purchase order pending formal purchase order. The interim purchase order was prepared for the signature of Graver (P1. 1). This letter reached Wilson in Denver, who signed it on October 20, 1961, and thereafter mailed it to the Plaintiff, who re-

ceived it on October 26, 1961. Wilson signed the interim purchase order for and on behalf of Graver. On October 16, Mitchell prepared the Plaintiff's shop order for the agreement made on October 13, and assigned it Mosher's No. 66109, showing Graver as the customer (P1. 12).

Mosher began forthwith its performance under the contract of October 13, 1961, commencing with engineering (R.T. 251), and by October 23, 1961, the shop had commenced work on templates, and steel had begun to arrive from Graver in railroad cars sent Freight Collect (R.T. 285-6). This steel was stenciled "Property of Graver Tank and Manufacturing" (Wilson R.T. 181), and was owned by Graver (Harle R.T. 905) which was obligated to furnish certain raw steel to the Joint Venture under the contract (Middleton R.T. 573).

In the meantime, Harle had called Burton from Denver on October 19, 1961, and identified himself as Director of Purchases for Graver, made complimentary remarks about Mosher's ability and dependability, told Burton that he had a copy of the October 16 letter (Pl. 1), that he was in agreement, and that a Graver purchase order would be forthcoming as soon as he could get some of the more pressing problems out of the way (R.T. 253).

In the restricted direct examination of Mr. Harle on the stand, Harle was asked whether he had made the statement Burton had ascribed to him "in words or in substance", that he was familiar with the company, that it operated along the lines of Graver, that he had a copy of the letter Mitchell had written, that he was in agreement, and that a Graver purchase order would be forthcoming. The witness Harle denied having made any of the above statements in words or in substance. Upon cross-examination, however, Harle admitted:

1. He had known about Mosher Steel before the conversation and knew of Mosher as being a very large

and reputable fabricator in Texas, described by the witness as "they were excellent" (R.T. 909);

2. That at the time when he called Burton on October 19, he had seen a copy of the October 16 letter (Pl. 1) and knew that a formal Graver purchase order was expected (R.T. 910-11).

From the above, it may be readily inferred from the cross-examination of Harle, that Harle did indeed tell Burton that he was familiar with Mosher, which he was, that his information was laudatory, which it was, and that he had seen a copy of the October 16 letter, which he had. Further, since, on October 19, 1961, Harle knew all the terms of the October 16 letter, including the fact that it was an interim purchase order with Graver and that a formal purchase order from Graver was to be forthcoming, it is not difficult to believe that Harle indeed told Burton all of the things which Burton ascribed to him in that conversation. In any event, if Harle was not in agreement and did not intend that a formal Graver purchase order would be forthcoming, he did not so inform Burton. On the contrary, he insisted, over Burton's objections, that Burton come to Denver to sit down with him and the material people to work out the problems related to shipping steel to Mosher from the mills at Chicago and the re-shipping of materials which were already in Denver (R.T. 254).

Pursuant to Harle's request, Burton went to Denver and met with Harle and Wilson on October 23 (R.T. 255). In this conference the October 16 letter (Pl. 1) was the basis for the conference and was gone into in detail (R.T. 255 and 257).

In that conference in Denver, Harle told Burton that the October 16 letter would serve as an interim purchase order until a formal purchase order could be sent to Mosher by Graver, and further informed Burton that Wilson had signed the purchase order and had returned it to the Dallas office

of Mosher (R.T. 257). Harle also told Burton that it might be two or three weeks before the formal purchase order would be received (R.T. 258).

There is no denial in the record by Harle of any of the facts related by Burton relative to the October 23 meeting in Denver, or to the fact that the October 16 letter was the basis of the conference and was considered in detail at the conference, except that he denied ever telling Mosher that he, Harle, would give them a purchase order (R.T. 945).

Wilson confirms Burton's testimony relative to the fact that the October 16 letter (Pl. 1) was the "basis of setting up everything", and that Harle, Burton and Wilson went over every item of the entire letter, and Wilson confirms that Harle assured Burton that a purchase order would be forthcoming (R.T. 197).

Wilson sent copies of the October 16 letter to Graver, Tucson; IMI, Los Angeles; and possibly Graver, Chicago. He also gave one to Harle (R.T. 194).

That Harle was familiar with the October 16 letter (Pl. 1) by October 18, and that Harle had commenced acting thereon on that date is shown by a document (Jt. 60) dated October 18, 1961, signed by Harle, informing Mosher of the procedure on shipments to Mosher and referred to Mosher's Order No. 66109, which number had originated with Mitchell and been communicated *only* in the October 16 letter (Pl. 1) or verbally to Wilson in Dallas on October 13 (R.T. 96 through 98).

A copy of the October 16 letter (Pl. 1) reached R. R. Branting, Senior Contracting Engineer for Graver in Chicago, and Branting thereupon wrote Lancaster a letter (Union E) in which he expressed surprise that a purchase order was to be forthcoming from Graver, and that Denver Steel and Iron Works had or was to sign the October 16 letter on behalf of Graver, and asked that a procedure be

set up to avoid duplication (R.T. 511). Branting admitted that he questioned the authority of Wilson only because Graver's general procedure did not authorize persons who were not employees of Graver to sign on behalf of Graver, and that he did not know whether Wilson had been authorized outside of the general procedure or not (R.T. 534-5).

Despite full knowledge of the October 13 agreement, and the interim purchase order, no one of the interested persons of Graver, to-wit, Harle, Lancaster or Branting, or anyone else, informed anyone representing the Plaintiff or Mr. Wilson, the agent, (R.T. 198, 199) that Wilson was not authorized to enter into the agreement on behalf of Graver, and Mosher, relying on said agreements, proceeded with the work, so that at the time when the IMI-Ward Joint Venture purchase orders were accepted, Mosher had expended or become obligated in excess of \$40,000 on account of its performance under the October 13 and 16 agreements (R.T. 287).

All of the testimony and evidence in the record supports a finding that Wilson was the agent of Graver in making the contract of October 13 and in signing the October 16 letter, which memorialized the agreement of October 13. Wilson's express authority from Lancaster is not disputed. The authority to sign the letter of October 16 follows from the authority to make the agreement of October 13 because the letter of October 16 merely memorialized the agreement of October 13.

In addition, all the other facts and circumstances surrounding the transaction confirm the agency, as follows: a. The agreement with Mosher was instigated and ordered by Graver; b. Graver's credit was dedicated to the contracts which were placed in other hands at Graver's insistence; c. The letter of intent between Graver and the Joint Venture

provided that the cost of Graver supplied materials would be deducted from the contract price to the Joint Venture; d. S. A. Wilson had previously procured steel for the missile bases for Graver and in so doing had been authorized to commit, and had many times committed, that a Graver purchase order would be issued therefor; e. Graver shipped to Mosher freight collect, raw steel owned by Graver with its name stenciled thereon *which was at all times owned by Graver* and which it was under obligation to furnish to the Joint Venture under the contract with it; f. Harle, who was the Director of Purchases and would likely have issued a formal Graver purchase order reviewed the October 16 letter and discussed it with Burton of Mosher and Wilson and confirmed to both of them that a formal purchase order would be issued within a few weeks and further confirmed at the October 23 meeting with Burton in Denver that Wilson had signed the October 16 letter and sent it to Mosher; g. Harle, under these circumstances took no issue with Wilson's authority, either with Wilson himself or with any representative of Mosher, despite the fact that he knew that both Mosher and he, himself, were, at the time, performing the agreement by work done by Burton and others of Mosher and by the forwarding of materials to Houston; h. Neither Branting nor Lancaster, after full knowledge that Wilson had acted as Graver's agent, ever disabused Wilson, the agent, nor Mosher of Wilson's authority to so act.

The above facts not only establish Wilson's agency, express or implied, but constitute, at the very least, a ratification thereof by Graver with full knowledge, and, when coupled with the reliance by Mosher thereon to its detriment, estops Graver to deny the agency.

The trial court, in its Findings of Facts Nos. 16 through 28 (R. 1225-1228) has found as true the facts set out above upon which, it is submitted, a contract between Mosher

and Union existed prior to November 15, 1961 for the work to be performed for the Davis-Monthan job in Tucson. Such findings are supported by the overwhelming preponderance of the evidence. As to Davis-Monthan, the terms of the contract embodied in Jt. 9 between Mosher and IMI-Ward are identical with the terms embodied in PL 1 between Mosher and Union, and Jt. 9 refers to the oral agreements which resulted in PL 1.

Thus after October 16, 1961, Mosher continued to perform under the October 16 letter (PL 1) and the understandings reached at the October 13 meeting in accordance with the procedures set forth at the meeting with Harle in Denver on October 23 and the letter of October 18 from Harle to Mosher (Jt. 60) which had set forth procedures to be followed.

First Appearance at Mosher of the Joint Venture:

On October 31, 1961, Wallace Orr, who was "Director of Contracts for the IMI-Ward Joint Venture" (R.T. 786.) and William Holmes, Manager of Construction for the IMI-Ward Joint Venture (R.T. 791) came to Houston to see Mr. Burton, Vice President of Mosher Steel. Their coming was unannounced, insofar as Mosher was concerned. (R.T. 261.)

Prior to their coming to Houston, Mr. Morton, Manager of the Joint Venture, had given Orr a copy of the October 16 letter (Pl. 1) (Union's QQQQ), and Morton told him to go to Houston to "negotiate a contract or a subcontract between the Joint Venture and Mosher for the protection of both parties." (R.T. 791.) On October 23, the subcontract between Union and the Joint Venture had been executed. This date, of course, was subsequent to the October 13 meeting in Dallas between Wilson and the plaintiff, and subsequent to the October 16 letter. In Houston, Holmes and Orr met with Burton and then came to Dallas to talk with

Mitchell. At that time, Orr pointed out that he was negotiating for and representing the Joint Venture of Idaho-Maryland Industries, Inc., and Ward Industries Corporation. (R.T. 795.)

Orr was not entirely sure whether Mr. Moore or some other representative of the Financial Department of Mosher had met with him and Holmes in Dallas. Moore did however testify that he had been called from Dallas by Burton while he (Moore) was in Houston, asking whether Moore would accept the credit (R.T. 354) of IMI-Ward for the reason that *Holmes and Orr had requested that Mosher change the order from Graver to IMI-Ward "as it would be more convenient for accounting purposes."* (R. T. 353.) Moore told Burton that he would accept a purchase order from IMI-Ward "providing that Graver would be responsible for payment" (R.T. 354).

Burton testified that Holmes and Orr arrived in Houston unannounced (R.T. 261) and asked how Mosher was getting along with the Tucson job and asked if Mosher could fabricate a \$20,000.00 addition for Vandenberg (R.T. 809). Burton told them he would try to interweave the Vandenberg job in with the Tucson job (R.T. 261). When Holmes and Orr asked about the price for the Vandenberg Job, Burton suggested that they accompany him to Dallas to talk with Mitchell, in whose department matters of price would come (R.T. 262). They came to Dallas and met with Mitchell.

During the course of that meeting, Holmes and Orr raised the question about changing the customer from Graver to IMI-Ward. Holmes and Orr told Burton and Mitchell that they wanted Mosher to deal with IMI-Ward because:

"... it would be much easier and simpler for them, from the accounting standpoint, to have us accept an IMI-Ward purchase order." (R.T. 264).

Mr. Burton, from Dallas, then called Mr. Moore in Houston asking whether Moore would accept an IMI-Ward Purchase

Order, and Moore told Burton he would accept such a purchase order:

“ . . . as long as Graver would be responsible for payment.” (R.T. 264)

Burton then informed Holmes and Orr of what Moore had said relative to accepting the IMI-Ward Purchase order and the Graver responsibility for payment (R.T. 265).

Mitchell confirms the fact that Holmes and Orr advised him that the formal purchase order from Graver would foul up the Joint Venture bookkeeping (R.T. 85) and that it would complicate the bookkeeping, and they asked whether Mosher would accept a purchase order from the Joint Venture in lieu of the formal Graver purchase order (R.T. 85).

Mr. Mitchell identified *plaintiff's Exhibit 32*, as being *notes* which he had *made on October 31* during the meeting with Holmes and Orr, that he asked them the customer's name and it was given as Idaho-Maryland Industries, Inc., and Ward Industries Corp. (R.T. 88), and that they told him that they represented the Joint Venture of Idaho-Maryland Industries, Inc. and Ward Industries Corp., and asked acceptance of a Joint Venture purchase order (R.T. 89).

Mitchell also confirms that he told Holmes and Orr that the acceptance of the changed purchase order on Tucson and the acceptance of an order for Vandenberg was dependent upon credit approval by Mr. Moore, and that Burton called Moore in Houston and heard Burton advise Holmes and Orr that Mosher would not accept a Joint Venture purchase order unless Graver assured Mosher of payment of all invoices (R.T. 90). Holmes and Orr then informed Mitchell and Burton that they (Holmes and Orr) would check into the matter and let Mosher know (R.T. 90).

Mitchell did not enter any change in the shop order for Tucson, nor did he enter any shop order for Vandenberg at

that time (R.T. 90-91). The Tucson shop order was changed and the Vandenberg shop order entered *on November 16, 1961*. (R.T. 92-93).

On November 13, Orr called Mitchell and again requested that Mitchell accept the Joint Venture purchase orders and Mitchell again stated to Orr that they would have to be cleared with Mr. Moore of the Credit Department who was then in Lubbock. (R.T. 91).

The purchase orders (Jt. 9 and 10) were received by Mitchell in Dallas on November 10, 1961 (R.T. 96), and were retained on his desk *until the credit was approved on November 16*, at which time he forwarded the purchase orders to Houston where they were received on November 17. (R.T. 440).

As a condition of the acceptance by Mosher of the IMI-Ward purchase orders for Tucson and Vandenberg, Graver became obligated to pay Mosher directly for the fabrication, furnishing and freight costs done, delivered and incurred by Mosher for both the Tucson and Vandenberg jobs.

From the very beginning on October 31, 1961 when Holmes and Orr requested that an IMI-Ward purchase order be accepted by Mosher for the Tucson and Vandenberg jobs, Mr. Moore, Mosher's Treasurer and General Credit Manager, refused to permit the acceptance of the purchase orders unless Graver would agree to pay Mosher for its work, materials and freight charges. This requirement was first made on October 31, 1961 and was finally fulfilled on November 15, 1961. Mr. Moore's testimony on the subject is entirely consistent. It is not a simple matter of Moore saying one thing, and Page saying another. Moore's testimony is logical, entirely consistent, supported by other testimony and documents and given at length on the witness stand without any restriction on direct examination or upon cross-examination.

The testimony of Mr. Moore relative to the conversations leading up to and including the agreement of November 15 with Page of Union is as follows:

1. On October 31, 1961, to Mr. Burton, in response to the request of Holmes and Orr that the order be changed from Graver to Idaho-Maryland-Ward Industries:

"A. I told him we would accept it providing that Graver would be responsible for payment." (R.T. 354, lines 2-3).

2. First Moore conversation with Page: On *November 7, 1961*, in Burton's office, Moore told Harle:

"A. . . . I told him I would release it when we got confirmation about the responsibility of Graver to pay for the material." (R.T. 355, lines 1-2).

3. On November 7, 1961, in Burton's office, Harle told Moore:

"A. . . . that we should get in touch with one person that could give us assurance, and that was Mr. John Page of Chicago." (R.T. 355, lines 5-7).

4. During the November 7, 1961, telephone conversation to Page, Harle told Page:

"A. He said the shipments would be held up unless we could get assurance for payment of the material." (R.T. 355, lines 17-18).

5. Moore then talked to Page on the telephone as follows:

"A. I told Mr. Page we would have to have assurance, that if we were not paid within the terms of the sale that they would be responsible for paying Mosher Steel Company." (R.T. 355, lines 22-24).

6. Page responded to Moore:

"A. Mr. Page said he was not in a position to carry out my request without the approval of Mr. Morton, Manager of IMI-Ward Industries, Joint Venture." (R.T. 356, lines 3-5).

7. Moore then said to Page:

"A. I asked him if he would get in touch with Mr. Morton and he said he would and I would hear from him." (R.T. 356, lines 7-8).

8. Harle then spoke to Page, saying:

"A. . . . he was glad we could get something worked out on it." (R.T. 356, lines 24-25).

9. On November 13, 1961, Orr called Moore at Lubbock and in this telephone conversation:

"A. He asked that we accept the order strictly on the credit of IMI-Ward Industries for shipment of the material." (R.T. 358, lines 1-2).

10. Moore responded to Orr:

"A. I said that we would not accept it on that basis." (R.T. 358, line 4).

11. After additional requests by Orr and refusals by Moore, in the November 13 telephone call, Orr asked Moore if he would talk with Mr. Morton. Mr. Morton then got on the telephone, and Morton said:

"A. He asked the same as Mr. Orr, that I accept the order strictly on the credit of IMI-Ward Industries." (R.T. 359, lines 22-23).

12. Moore responded to Morton:

"A. I told him we would not accept it on that basis." (R.T. 359, lines 25).

"A. I asked him if he had spoken to Mr. Page and he said yes, that Mr. Page had called him in reference to the order. And I told him we would request and continue to request and asked him to get in touch with Mr. Page and give his approval of having them pay for this work." (R.T. 360, lines 2-6).

13. Morton responded to Moore:

"A. Well, he said if that was the only way we would accept it, he would have to give his approval." (R.T. 360, lines 8-9).

14. On November 15, 1961, Harle was requesting that shipments be made and Moore had not yet heard from Page on the responsibility for the payment of the material. Moore therefore called Page on November 15, 1961. (R.T. 360, lines 17-25).

15. Second Moore conversation with Page. Mr. Moore called Mr. Page in Chicago late in the afternoon of November 15, and said to Mr. Page:

"A. Asked Mr. Page if he had gotten clearance from Mr. Morton on the responsibility of Graver making payment for the material that we were fabricating for them." (R.T. 361, lines 6-8).

16. Page responded as follows:

"A. He said that he had received such okay from Mr. Morton for them to make payment for the material." (R.T. 361, lines 10-11).

17. Page further stated:

"A. He stated the payment would be made direct and any deduction made from the contract IMI-Ward contract." (R.T. 361, lines 14-15).

and

"A. He said Mr. Morton had proved that method of handling payment." (R.T. 361, lines 17-18).

18. Page further stated:

"A. He said that he would write me a letter in a day or two giving final approval on this agreement." (R.T. 361, lines 20-21).

19. In further exposition of the conversation with Page, Moore testified:

"A. . . . I did tell Mr. Page that we were practically ready to make the first shipment on this and we had to have something definite about the payment for the fabricated material. And I asked him if he had gotten approval from Mr. Morton for them to pay us direct

and deduct it from the contract. He said that he had talked to Mr. Morton and Mr. Morton had given him approval. And he stated that he would write me a letter in a day or two giving, outlining this agreement by Mr. Morton for the payment of the material." (R.T. 362, lines 5-14).

Insofar as the testimony of Mr. Page can be understood, Mr. Page testified that at the time when he engaged in the conversation with Mr. Moore he was then the Controller of the Graver Division of Union Tank Car Company and that his duties as such were "the financial responsibility, everything that a controller normally does, everything that a treasurer normally does," for the East Chicago and Salt Lake City plants of Graver and the various jobs Graver was doing throughout the country. (R.T. 694). Mr. Page was placed on the witness stand in the afternoon of December 1, 1964. During that afternoon session he testified that he had read the two depositions which had previously been taken of his testimony (R.T. 694-695) and testified that he *first* talked with Mr. Moore on "approximately November 15, 1961" (R.T. 696), that Harle had called him and put Moore on the phone from Houston (R.T. 696), that Moore wanted a guarantee of the payment of the steel that was being shipped to IMI (R.T. 697), that he told Moore he was not in a position to give a guarantee of the entire contract (R.T. 697) and then told Moore that he would guarantee the payment of one shipment that was ready to go which he had discussed with Mr. Moore as being a \$16,000 value. (R.T. 697 and 698).

Page admitted that he had told Moore that he would send him a letter (R.T. 699).

After this conversation with Moore on November 15th, Page testified he prepared and sent a telegram to Moore, (R.T. 699) (Jt. 22), and that thereafter he never talked with anybody at Mosher. (R.T. 701).

On the afternoon of December 1, 1964 Page did not recall talking to Moore on November 7, 1961. (R.T. 701). He first admitted that Moore wanted Graver's guarantee on Mosher's shipments to IMI-Ward (R.T. 705) but then immediately, in response to an identical question by Graver's counsel as to whether Moore had said he would have to have assurance that Graver would be responsible, he answered "No". (R.T. 706).

Page denied telling Moore that he would have to obtain the approval of Morton, that he never did consult with Morton and never told Moore that he had gotten a clearance from Morton. (R.T. 706-707).

Page admitted that he had told Moore he would write Moore a letter in the wire (R.T. 707) but not on the telephone. (R.T. 707). This, of course, contradicted his testimony at R.T. 699 that he had told Moore on the telephone that he would send Moore a letter.

Page then testified that he called Vernon John two or three times a week and had called him on November 2, at which time he, Page, had told Vernon John of the request and that John had told him that someone in John's office had told him that Mosher was no longer asking for this "guarantee." He also told Mr. John that he did not have authority to guarantee, unless John gave his permission. (R.T. 709-719).

The flavor of the Page testimony can be gleaned in part from the questions on page 710 of the reporter's transcript in which he, the financial man for Graver, first stated that he did not think he had any knowledge of how the invoices which were issued on the work at Tucson were being paid. This answer caused counsel for Graver to ask Page if he had ever heard of United California Bank. After this question he testified that he did know all about how the invoices were being handled and his memory was excellent.

He remembered writing a letter to the effect that he was "generally aware of the accounts receivable financing agreement" and he even remembered the names of the President and Vice President of United California Bank, whom he had met at a visit to the bank. (R.T. 713-714). With respect to Union LL and a question by counsel whether he remembered receiving it, after much doubt he finally said: "Oh, I think I—yes, I'll say that I can say that I did." (R.T. 715-716).

Thus ended the testimony on December 1st.

On the morning of December 2, 1964 Mr. Page resumed the stand and immediately changed his testimony of the previous day (and the testimony contained in his two previous depositions) and was now convinced that the *only call* he received from Mr. Moore was on November 7th rather than November 15th. (R.T. 722). It later developed that the change in Page's testimony resulted from a discussion with counsel in the presence of Harle on the night of December 1st, in apparent violation of the court's order sequestering witnesses. (R.T. 52)

Page now remembered that he had received a TWX from Harle dated November 15, 1961 and that he had sent the telegram after receiving the TWX from Harle. (R.T. 723, 725, Jt. 45).

Next Mr. Page attempted to explain the second sentence of the wire of November 15th (Jt. 22) as referring only to the details of the first sentence, which had to do with a guarantee of November 16th shipment (R.T. 725), but he admitted he never sent a letter with those details because there was no follow-up and he wasn't sure it was necessary. (R.T. 725). This was the first time in three separate stints at testifying in which Page had attempted to refer the second sentence of the telegram to the first sentence thereof. In his previous testimony, as will be pointed out, he

conceded that *the letter mentioned in the second sentence would have been relative to the entire account* if he had sent it.

All of the above resulted from the direct examination of Mr. Page by Graver's attorney.

Cross-examination ensued. In that examination Page admitted that Mr. John would have to agree if Graver were to withhold money to pay Mosher. (R.T. 730).

Next Page stated that while his mind had been put at ease on November 2nd by his conversation with Mr. John he became aware on November 7th that Mr. Moore wanted a guarantee. (R.T. 732). He then imputed to Mr. Moore a statement *on November 7th* that Moore had a \$16,000 shipment setting on the dock and that he told Moore he *would think* about guaranteeing payment of that shipment. (R.T. 732). He had previously testified that he had told Moore he would guarantee the first shipment. Of course, all of the other testimony, including Mr. Harle's, makes it impossible to believe that Moore said on November 7th that he had a \$16,000 shipment setting on the dock, in view of the fact that on November 7th when Harle came to Houston the work had not progressed to the point where any shipment was at all imminent. Page said he probably told Moore that he would write Moore.

Page said that Harle called him on the 15th and sent the TWX in confirmation of his phone call and that Jt. Ex. 45 reflected the conversation. (R.T. 733). He admitted that Moore wanted a guarantee of the entire account and that is what Moore asked for on November 7th. When asked if the entire account is what Page told Moore the letter would be about, there was an interesting series of answers, (R.T. 734) in which the answer to the question was avoided by saying that the contents of the letter were unknown, that he said he would send Moore a letter after he had checked

up on it, and that the letter was not necessarily responsive to Moore's request for a guarantee of the entire account because "the letter might have said no, I won't guarantee it." (R.T. 734).

At this point the witness admitted that his reason for changing the date of the conversation with Moore from the 15th to the 7th was that Harle was not in Houston on the 15th and that he had discovered that fact the previous night. (R.T. 736).

Next ensues a series of questions and answers in which the witness first said he *did not ask* Vernon John to send a letter authorizing deduction from the Joint Venture to pay Mosher (R.T. 736), that he *did* discuss the matter with Vernon John, however, (R.T. 736), that he didn't know whether Jt. Ex. 26, (the Vernon John letter dated November 13, 1961) was responsive to that discussion (R.T. 737) because the letter didn't get to the office until after he had left, *but finally*, recognizing that the letter was not received until after he had left Graver, *he admitted that the Vernon John letter was what he, Page, had asked Vernon John to send him.* (R.T. 737). Again, on R.T. 738, he testified that he didn't know whether he asked for the Vernon John letter (Jt. 26) specifically, but that he did ask Vernon John for something in that nature.

Page said he asked no permission before sending the November 15th telegram and that no one had ever questioned his right to send it. (R.T. 739). He never sent a copy of the telegram to Branting (R.T. 739) but probably sent a copy to Feurt.

With respect to the \$16,000 value placed on the first shipment, Page said that Harle could have mentioned the figure as well as Moore on November 7th. (R.T. 741).

Then Mr. Page was referred to his first deposition in which he had testified that Mr. Moore wanted a guarantee

by Graver of the entire account and that on that subject he told Moore he would write Moore a letter, and that right after the conversation with Moore he sent him a wire confirming the conversation. (R.T. 743). He then testified that he did not think the wire confirmed the conversation. (R.T. 745). He then avoided answering direct questions about what the letter was to be about, saying: "I don't know. I never wrote the letter." (R.T. 746). Then his testimony upon deposition was read to him in which he said he had told Moore that he would write Moore a letter about the *entire job*. (R.T. 746-747). He was then asked if that was his testimony and he finally answered "Well, that's—yes, that's.....". (R.T. 748). He then said he did not write the letter because there was no follow-up, but of course he admitted receiving a telephone call and TWX from Harle on November 15th and that in the telephone call he "may have" told Harle that he would write the letter to Mr. Moore immediately. (R.T. 749).

At R.T. 750 he then admitted that he worded the wire of November 15th very carefully because he wanted to guarantee the one payment and he didn't want the wire to be misleading (R.T. 750) but in the next breath he indicated that he wanted to indicate in the wire that there was a letter coming on the whole account. (R.T. 750).

Upon being referred to his previous deposition in which he stated that he had told Russell Moore he would write a letter about the whole account (R.T. 752) he stated that that was also his present testimony.

He was then referred to his testimony upon deposition in which he said that the only way in which he recalled the exact date of a conversation with Russell Moore was the fact that he had sent a telegram promptly after the conversation. (R.T. 753).

The witness was then read his testimony upon previous deposition in which he had admitted that the second sentence of the telegram referred to a guarantee of the entire account. (R.T. 754). He said this was also his present testimony.

The witness was next referred to his previous testimony in which he had said that Harle had told him of the problem of the Mosher guarantee prior to November 15th and that one of the problems was credit and that Harle had referred the problem to him and that he would be called upon to resolve it and that he knew all of this before November 15, 1961 (R.T. 757), that he thought about the matter and did not want to guarantee the contract (R.T. 758) but told no one, including Moore, despite the fact that he said he had already made up his mind that he was not going to guarantee the whole account. (R.T. 759).

By reading some of the previous depositions, Graver's counsel sought to infer that after November 15th Page had talked to Vernon John and that Vernon John had assured him there was no further necessity for the guarantee. Upon cross-examination, however, Page remembered the conversation referred to in Union's Ex. K on November 2, 1961, but did not remember what any of the other conversations between him and John had been about (R.T. 777).

Page was further questioned with respect to the assurance by Vernon John that Mosher was no longer requesting a guarantee and finally admitted that that assurance came to him from Vernon John *no later* than November 2, 1961 (R.T. 780) and that he *discovered on November 7th* that Mosher wanted Graver to be liable for the entire account (R.T. 781) and that whatever Mr. John had told him previously had gone by the boards.

This was the end of Mr. Page's testimony.

The testimony of Mr. Page has been recited in detail because it is submitted that his testimony changed not only from deposition to the witness stand, but even changed from one minute to the next during the hours which he spent upon the witness stand. He attempted to avoid answering direct questions, the answers to which were detrimental to Graver's case, and would only confess the detrimental answers after being confronted with his testimony upon deposition. In his depositions, Mr. Page was willing to confirm certain facts about which Mr. Moore and others had testified, reserving his denials, more or less, to the contention that he did not say to Mr. Moore what Mr. Moore had said Mr. Page had told him. On the stand, however, he went so far as to deny even things which he had not denied before and to confuse the issues so completely that it is impossible to obtain even a coherent resume of his testimony. Some of these answers, reluctantly given, confirm the testimony of Russell Moore, but most of them are a hodgepodge of contradictory statements which make no sense standing on their own and are completely at odds with other testimony in the record and with a dozen written documents which are in evidence.

In short, it is submitted that it is impossible to believe Mr. Page and at the same time to believe one's own eyes.

Almost without exception the testimony of the other witnesses in the case and the many documents in evidence absolutely confirm Mr. Moore's statement of Page's agreement, and Page's denial stands alone and makes absolutely no sense in the light of the whole record.

The testimony of Mr. Harle, Graver's Director of Purchases, was truncated due to the fact that Graver's attorneys determined, for reasons best known to themselves, that Harle's testimony should be restricted to saying that certain statements that were made by Mosher's witnesses were not

true. One of these statements had to do with what Harle had told Burton, Mitchell and Moore at a meeting in Dallas on February 16, 1962, as follows: "That you had contacted Mr. O'Boyle, and Mr. Browder and Mr. Jones and told them you were going to pick up the invoices and go over the final billings and proceed from there to IMI's office in Los Angeles and be sure everyone was in agreement, and you were going to take the matter from there to Chicago and see that Mosher got their money promptly." (R.T. 880). Harle was asked whether he had said that in word or in substance and replied "No, sir."

At the beginning of his cross-examination Mr. Harle emphatically denied that he had checked with O'Boyle, Browder or Jones before coming to see Mosher on February 16th. He then, however, admitted that he had told Jones that he was going to Dallas but he didn't remember whether Jones had told him that O'Boyle and Browder had told him to go ahead. (R.T. 889). He further denied telling Moore, Mitchell or Burton in Dallas on February 16th, either in words or substance, that "there's no question about the responsibility for payment of this work, and that there was an agreement that Graver would compensate Mosher and that you (Harle) would so testify in any place to that effect." He did admit that he came to get the invoices. (R.T. 893). Harle stated that he had received Union's Ex. P, the memorandum from Wright to Harle (R.T. 895), and said that it was responsive to Jt. 28 which he had written to Wright. (R.T. 896). Harle admitted that he knew Vernon John had written the letter (Jt. 26) (R.T. 902-903) *and that he had seen a copy of it on November 14, 1961.* (R.T. 903-904). He admitted, after being shown Jt. Ex. 50, that Page had told him that he (Page) would take care of the problem of securing a release to the manufacturing division of Mosher to release the shipment. (R.T. 913). He then denied knowing that Mosher was demanding a guarantee

on the entire job (R.T. 913) and stated that when he called Mr. Page from Mr. Moore's office on November 7th he knew Mr. Moore had problems but did not know what they were. (R.T. 914). However, he knew that the problem was credit and that Mr. Page was the man who could take care of Mr. Moore. (R.T. 914).

On that date (November 7, 1961) there was no shipment ready to go, "there was practically no fabrication started, sir, a little, not too much." (R.T. 914).

At this point Mr. Harle stated that he *deliberately left the room* after introducing Moore to Page on the telephone on November 7th, and did not hear what Mr. Moore said to Mr. Page. (R.T. 915). His reason for leaving the room was "because I, would you say, wanted no part of it." Of course, Mr. Harle admits that he was definitely concerned with getting the job done, inasmuch as he was the expeditor and Moore and Burton testified that Harle remained in the room at the desk alongside Moore. Under the circumstances, the trier of the facts can, and perhaps has, determined whether Harle, in fact, left the room, which is incredible in view of his position as Director of Purchases, and the fact that he was a vigorous expeditor and anxious that the credit matter be resolved. His exit from the room, of course, removed Harle's ear from contact with one of the two or three important conversations involved in the suit.

Harle was referred to his deposition in which he had said that he had the impression that Mr. Page and Mr. Moore had an agreement. (R.T. 916). His impression was based in part on the fact that shipments came to the sites (R.T. 917), that he knew something had happened to permit shipment to come forward. In his previous deposition at R.T. 920, he was asked if, on February 16th, 1962, Harle had the impression that Page had taken care of the matter with Mosher. He answered as follows: "With a qualification, if

you will accept it. I could see how I could have that impression, because Page said he would take care of those shipments and they did come forward. *The whole thing was completed.* It is entirely possible I had that impresssion." (R.T. 920). And upon the question whether he had so informed the Mosher people at the February 16th meeting, he answered "It is entirely possible I did."

When confronted with Jt. Ex. 61 in which Harle had written to Wright on *November 30, 1961* "You may recall that Mr. John worked out an arrangement with Mr. Page of Graver and Mosher Steel for payment of the invoices when due", he tried to indicate that the past tense "worked" really meant "was being discussed and tried to be worked out."

Harle testified that after checking the invoices with Mr. Wright, after February 16th, he agreed with Wright that *Mosher's work had been completely and properly performed.* (R.T. 923-924)

Mr. Harle stated that he had discussed the Mosher credit matter with Mr. John prior to November 15th (R.T. 1027) and that Mr. John had told him that he (John) had written to Mr. Page (R.T. 1027), that he had seen the Vernon John letter to Mr. Page during the same visit to Los Angeles (R.T. 1029) and that he had received a copy of the letter (R.T. 1032).

On November 14, 1961, Harle had seen a copy of a letter from Vernon John to John Page "requesting Graver write Mosher Steel guaranteeing payment of D. S. & I. order." (Jt. 25). The next day, after talking with Page about the specific matter of the requirement of Mosher that Graver be responsible and the agreement thereto by Graver, Mr. Harle, from Tucson, wrote Mr. Burton a letter dated November 15, 1961 (Jt. 50) in which he said "I spoke to John Page and he agreed that the letter should be in Mr. Moore's hands today or tomorrow." Then, knowing that the

last requirement by Mosher had been met, to-wit, the agreement by Graver to pay, he proceeded to give detailed instructions to Burton with respect to the method of handling the shipments. (Jt. 50.)

It is submitted that, even on the restricted examination in which Graver's attorneys indulged, the witness Harle was substantially impeached and it may be concluded that he did indeed make the statements attributed to him by Moore, Burton and Mitchell at the February 16th meeting in Dallas and that his testimony relative to walking out of the room is incredible and clouds Harle's testimony on any point where Graver's interest could have been prejudiced.

Further, it is quite clear from the things which he did, to-wit: the letters he wrote and TWXs he sent, that Harle knew that Page had agreed that Graver would be responsible, and confirm Moore's testimony on the subject.

In addition, Mr. Moore's testimony is substantiated by Mr. Branting, Graver's Senior Contracting Engineer, who first claimed he had closed his file on the Mosher matter on November 7, 1961, after receiving a TWX from Lancaster to the effect that Mosher was no longer to receive a purchase order from Graver, but upon cross-examination conceded that he had reopened it on the same date, changing the subject to guarantee, which had been referred to Mr. Page (R.T. 531) and that on November 7th he knew that Mosher was seeking a guarantee of payment despite what the November 2nd Memo (Union K) had said about the conversation between Page and John on November 2nd. (R.T. 536-537). Branting then stated that he had heard nothing about the Mosher account between November 7, 1961, and sometime in 1962. When confronted with Jt. Ex. 26, however, he conceded that he had attempted to find a letter from Vernon John to John Page sometime *prior to the 6th of December* and that he was looking for a copy of

the letter which had been showed him a few moments ago. (Jt. 26) (R.T. 539-540). Branting did not see Graver's copy of the telegram from Page to Moore (Jt. 23) although he said he should have received a copy of it (R.T. 531), in view of the fact that his duties were to act as a focal point of information for contracts and subcontracts of the Graver Division, to be a liaison man between Graver and its subcontractors, Graver and its prime contractors, and to maintain a file of records, all documents particular to the job to which he was assigned, including the Tucson contract. (R.T. 504).

Mr. Moore's testimony is further confirmed by the testimony of Mr. George Morton, the President of IMI, and the Manager of the Joint Venture. He testified that he saw the Vernon John letter (Jt. 26) shortly after it was written (Morton 2, p. 52, Pl. 40), and that it *constituted a modification* of the Joint Venture contract with Union.

George Morton further testified that the *Vernon John letter* authorizing Graver to pay Mosher and to deduct from the Joint Venture contract price *contained his understanding of the then situation and of what was to be done* (Morton 2, p. 29-30, Pl. 40 *supra*). Morton further said it was brought to his attention that Mosher was requiring a guarantee of the purchase order and that these arrangements had to be made *before they would accept the purchase order* (Morton 1, p. 27, Pl. 39).

Morton does not recall talking to Mr. Moore but said it was entirely possible that he may have. (Morton 1, p. 28 Pl. 39 *supra*).

Morton testified that Harle had informed him that Graver had guaranteed the payment of the Mosher account and that it was being handled by the Chicago office and that it would normally be handled by a Mr. Page (Morton 1, p. 30) Pl. 39 *supra*).

Vernon John, the financial man for the Joint Venture, and a member of the Joint Venture committee, confirmed Mr. Moore's testimony in testifying that Wilson had told him that Mosher wouldn't deal with IMI without help from Graver and that IMI's credit was no good insofar as Mosher was concerned (pgs. 32 & 33 Vernon John Dep., Pl. 41). Further, he testified that he had sent the letter to Page because he knew he had to (Jt. 26) and that it must have been sent pursuant to discussions with Page. (Pgs. 34 & 35, Pl. 41).

On or about December 4, 1961, John left his office at Graver Tank, *never to return*. He was relieved of his employment *in a telephone call* to him while he was on a trip. (R.T. 740).

Two days *before* the November 15th conversation between Moore and Page, Vernon John had written a letter dated November 13th (Jt. 26) saying:

"This is your authority to pay Mosher Steel invoices, which will approximate \$225,000.00, after our acceptance of the work performed by this company.

"This is also your authority to deduct the amounts of such payments from our joint venture contract price for the work on the Tucson and/or Vandenberg sites."

This letter (Jt. 26) was written on November 13th pursuant to Page's request (R.T. 737). A copy of it was seen on November 14th in Mr. Wright's office by Mr. Harle. (Jt. 25). Pursuant to his knowledge of the situation and his duties as Expeditor, Harle wrote Frank Wright, on November 30, 1961, a letter in which he said "You may recall that Mr. John worked out an arrangement with Mr. Page of Graver and Mosher Steel for payment of the invoices 'when due'" and asked Wright to check on the procedure so that the invoices could be paid "when due", saying "you know the first shipments were delayed a couple of days because of this difficulty."

Unaccountably, after Page's departure on December 4th, the letter from John to Page (Jt. 26) could not be found in the Chicago office of Graver and Ray Branting so informed Mr. Harle prior to December 6 (Jt. 25). Harle then sent a TWX (Jt. 25) to Frank Wright reminding Wright that he had seen a copy of the letter, telling Wright that the letter had not been found in Chicago by Ray Branting, and asking Wright to have Mr. John send another letter "*same date*, sign it, send to J. Page with copy to R. Branting. Can you mail 12-6-61?" (Jt. 25). Jt. 26, the letter of November 13th was marked received on December 11, 1961 in the office of John V. Page. It is important to remember that on that date Mr. Page had been fired and Mr. E. L. Feurt, who had been assistant to Mr. Page, was, on the 11th, the only one in the Controller's office and became assistant to the new Controller, J. P. Trytten, when Trytten assumed the office on December 12, 1961.

Mr. Feurt had known at least since shortly after November 7th that Mosher was seeking a formal guarantee from Graver and that the matter had been turned over to John Page. (Feurt Dep. Pl. Ex. 36, p. 398). In addition, he knew from Harle before November 15th that Mosher wouldn't make deliveries unless Graver would be responsible for payment. (p. 442-443, Feurt Dep. Supra). He had talked with Page about the matter and said that Page's discussion of the matter at that time left it unresolved. He wrote, on December 12th Jt. 24, which is a memorandum from Feurt to Mr. Trytten, in which he set up a preferred procedure whereby Graver would receive Mosher's invoices from Vernon John, the invoices would certify that the material had been received and was approved for payment, and Graver would pay Mosher directly. He set forth the estimate by Tom Harle of Mosher's invoices. Mr. Trytten obtained the approval of Clark Root, President of Graver, to handle the matter in this way and so wrote upon the memorandum. (Jt. 24).

Feurt then wrote a letter for Mr. Trytten's signature to be sent to Mosher. (Jt. 21). In addition, on December 12th he sent to Mr. McNabb, the accountant in the field, a memorandum of the agreement so that Mr. McNabb would be informed and would not pay twice. (Jt. 30, p. 460 Feurt Dep. Supra).

On December 22nd Mr. Harle, being concerned whether Mosher would stop work if they were not promptly paid, asked Frank Wright to check into the matter and to mail him the original invoices if Wright wanted Graver to pay them. (Jt. 28).

Wright responded on January 5, 1962 (Union P) that he was not clear why, but he had been told that Graver would not pay Mosher's invoices directly and for that reason he would like to put the Mosher order on a "Joint Venture requisition to Graver to insure prompt payment."

All of the above activity among Graver personnel occurred without any further contact from Mosher after November 15. True, Mr. Trytten, in his deposition, indicates that someone from Mosher called him on December 11th or 12th, and discussed with him a letter which was mentioned by Page in a telegram and that he searched for the letter but found only a telegram. (Trytten Dep. Pl. Ex. 36, p. 367). He did not remember anything further about the conversation nor with whom it was held. (p. 368 Trytten Dep. supra). The identity of the caller from Mosher, if there was one, remains a mystery.

It is not difficult to understand why Trytten, on his first day as Controller, delayed signing and sending Jt. 21 when Lancaster told him "steel shipments are not being held up. Proposes we guarantee only on a separate shipment basis if requested." (Jt. 24). It is interesting to note that while the record does not show that Mr. Trytten ever signed

Jt. 21, the record does show that the original letter was never destroyed but was carefully preserved in Graver's file.

The telegram of November 15, 1961, (Jt. 22) from Page to Moore is relied upon by the Defendant Graver to restrict the obligation of Graver to the November 16th shipment.

The fact is, however, that the preponderance, if not all, of the credible testimony and the evidence supports the proposition that the telegram was intended to, and did, confirm Page's statement to Moore that Graver would pay for the entire account. It must be remembered that the telephone call between Page and Moore on November 15th occurred late in the afternoon and that the telegram was sent at 5:23 p.m. on November 15th by John Page from Chicago, and did not arrive at Mosher's office in Houston until late in the evening of that day. It should also be remembered that on November 15th (not November 7th) there was a shipment which, it was hoped, could be sent on November 16th and that Tom Harle was very anxious that the shipment be made on the 16th "so it travels over the weekend" (Jt. 45) and that Harle's anxiety that the shipment be made on the 16th, before, rather than after, the upcoming weekend, had been communicated by Mr. Harle to Mr. Page in Jt. 45 on the same day (November 15) on which Mr. Moore talked with Mr. Page.

The testimony and evidence supports, and no credible evidence disputes, that in the telephone conversation between Moore and Page on November 15th: (a) Moore demanded that Graver be responsible for the *entire account*; (b) Page *admitted* that Moore was talking about the entire account; (c) Page told Moore he would write a letter in a day or two; (d) Page *admitted* the letter, had it been sent, would have referred to the *entire account* rather than to one shipment only, and (e) the second sentence of the telegram was *intended by Page* to refer to a letter which

would have concerned the *entire account* rather than one shipment, had the letter been sent.

Harle's TWX, the necessity of getting shipment on November 16th in order that it might travel over the weekend, and the fact that it was late in the afternoon of the 15th when the composing of a letter would have been difficult, certainly are common sense explanations for Page's telegraphic guarantee of the November 16th shipment. The second sentence relating, as the testimony shows, to the entire job, was absolutely redundant except to assure Mr. Moore that Page would, indeed, write the letter relative to the entire account. That is, the second sentence of the telegram confirmed the statement which Page had made on the telephone prior to sending the telegram, to the effect that Graver would pay Mosher and that Page would write Moore a letter in a day or two confirming this fact.

With respect to the telegram of November 15, 1961, Moore testified:

"A. . . . it indicated a letter was coming. I had already had assurance that the letter would be coming."
(R.T. 364, lines 20-21).

Again, with respect to the telegram, Moore testified:

"Q. You didn't pay any attention to it at all."

"A. I paid attention to it that it said the fact I was to receive the letter in a day or two.

"Q. That is what you looked at, was the part of it that said you were to get a letter in a day or two.

"A. Yes.

"Q. The reason you ignored the telegram was that you said in your deposition that, in the first place you hadn't asked for the telegram.

"A. No, I didn't ask for the telegram.

"Q. And, in the second place, you had Page's oral promise.

"A. Yes, I had a promise for the entire order.

"Q. And you expected a letter from Mr. Page. The telegram says: 'early next week.' It says, 'early next week.'"

"A. Yes." (R.T. 413, lines 5-20).

"Q. Mr. Moore, admitting that there was an emergency in that the shipment was being held up, are you sure this wasn't to be handled by telegram?

"A. Not as far as I was concerned, it wasn't, because he made a commitment for the entire job and I don't know that—I wasn't expecting a telegram." (R.T. 414, lines 9-14).

With respect to the letter, Moore testified:

"Q. Then why did you ask for a letter?

"A. I don't recall that—he promised the letter and I don't know it was strict on my request he did. It was understood all the time from November 7th he was to give us this okay." (R.T. 414, lines 22-25; Tr. 415, line 1.)

"A. I understood all the time it was supposed to be a guaranty of the entire amount." (R.T. 415, lines 23-24).

and

"A. I had assurance from the very beginning, yes. I expected the entire amount to be guaranteed." (R.T. 416, lines 1-2).

and

"A. I expected a guaranty of the entire amount, when he made this commitment on the 16th." (15th) (R.T. 416, lines 5-6)

and

"A. On the 15th I had assurance from Mr. Page that the entire account was guaranteed." (R.T. 416, lines 15-16.)

While admitting that Moore's requirement that Graver be responsible went to the entire account; while further admitting that he told Moore he would send a letter relative

to the entire account; and while finally admitting that the second sentence in the telegram referred to a letter involving the entire account, Mr. Page nevertheless says that he did not know what would have been in the letter, that it might have turned Mosher down on its requirement as to the entire account, and that before talking with Mr. Moore or sending the telegram he had already made up his mind that he did not intend to write a letter guaranteeing the entire account.

It is submitted from the full record that *these latter statements of Page's are not credible*, but assuming that they were credible, it appears quite obvious that in view of Page's knowledge of what Moore was demanding, as admitted by Page, and second sentence "complete details will follow in letter early next week" were fraudulently conceived for the purpose of misleading Moore, to Moore's detriment, with knowledge that Moore would, in all probability, rely thereon.

Finally, there is no dispute whatever but that Mosher relied upon the commitment made in the telephone conversation by Mr. Page to Mr. Moore on November 15, 1961 (R.T. 445, lines 11 through 22), and that Mosher's performance and its acceptance of the IMI-Ward purchase orders was conditioned upon Graver's commitment and that such purchase orders were not accepted by Mosher until Graver's commitment was received.

Appellee submits that the other testimony and evidence in the record overwhelmingly confirms and supports the testimony of Mr. Moore that John Page, on November 15th, agreed with Mosher that Graver would pay Mosher *direct* for all of the materials fabricated and furnished to the Tucson and Vandenberg bases, and that IMI-Ward had given its approval that Graver pay Mosher direct and deduct the payments from the Joint Venture contract, and that the letter mentioned in the telegram and telephone con-

version of that date was not intended by Page nor Moore to be a condition precedent to this obligation.

Even if, however, it could be said that such a letter were deemed necessary by Page, it is submitted that Graver is estopped upon equitable principles from contending that on that account it is not liable to Mosher. The only thing which remained to be done to fully document the responsibility to Mosher was the signing and sending of the letter prepared for Mr. Trytten's signature on December 12, 1961. (Jt. 21).

On that date, Lancaster knew that Mosher had required that Graver guarantee payment. (Union L). Harle, Branting, Feurt and Root all knew that Mosher expected Union to be responsible for payment (Union L, Jt. 61, Jt. 45, Jt. 50; also see the testimony of Page, Harle, Branting and Feurt recited above), and would not ship unless Graver agreed to be responsible for payment. Harle was so convinced of this fact that he says he based his understanding that the entire account had been guaranteed by Graver on the fact that by February 16th the shipments had been made and the job was complete.

Even Mr. Trytten knew it. (Jt. 24).

In addition, at least Harle, Branting, Feurt and Trytten knew that Jt. 26, the Vernon John letter of November 13, 1961, had been received and authorized Graver to pay and to deduct from the Joint Venture contract price.

There is absolutely no other way to interpret both the language and the fact of Jt. 21, Jt. 24 and Jt. 30 except in terms of the fact that Mosher expected Graver to pay the entire account, that Graver knew this to be a fact, that Graver was in a position to do so with no risk to itself, by deducting the amount of the Mosher invoices from the Joint Venture contract price, and that Page had informed Moore that Graver would make payment directly to Mosher

and would deduct such payments from the Joint Venture contract price and would write Moore a letter to this effect. With this knowledge long antedating, except in the case of Trytten, the December 12th date, and with the knowledge Mosher Steel shipments were not being held up, Trytten, Feurt, et al, if they did not intend to carry through, sign and mail Jt. 21, were certainly under a duty, under all the circumstances, to speak up—to bring this fact to the attention of Mosher.

This they did not do. They did not return the alleged call from the mysterious man at Mosher. They did not do anything at all which would have disabused Mosher of Mosher's understanding as to the payment, but instead, armed with Jt. 26, so that Graver would be protected at any time that it saw fit to sign and send Jt. 21, Graver appears to have taken the cagey, and under the circumstances, immoral and unfair advice of Lancaster and assumed a negative attitude with respect to payment to Mosher, which negative attitude was based entirely on the fact that *Graver* could afford to be *negative* for the simple reason that *Mosher* was *positive*, in that Mosher was continuing to make shipments.

It is to be noted that Mr. Lancaster, in his recommendation as recorded in Jt. 24, makes no objection to guaranteeing, as such, and is quite willing to guarantee on a separate shipment basis whenever Mosher requested it. Thus, Mr. Lancaster's advice, which apparently was followed by Trytten, was a "let sleeping dogs lie" position, which, considering all of the knowledge surrounding the situation, was patently immoral, unfair and fraudulent.

Under the circumstances, it is submitted that Graver is estopped to deny its agreement with the Joint Venture embodied in Jt. 26, and is estopped to deny its liability to Mosher on the ground that the letter was essential to Graver's obligations.

In making its commitment to Mosher and inducing Mosher to perform the services and supply the materials for the Tucson and Vandenberg jobs, Graver received the following considerations:

- 1) Graver was enabled to avoid delay in the performance of its contracts with the Fluor Corporation and Mattich Bros. & Sundt, which delay, but for Mosher's willingness to perform when the Joint Venture couldn't, might have resulted in costly damages to Graver as well as Fluor and Mattich Bros. & Sundt.

- 2) Graver preserved its rights under its contract with IMI-Ward Joint Venture that the IMI-Ward Joint Venture would supervise the portion of the work performed by Mosher.

- 3) By inducing shipment of Graver's steel fabricated by Mosher it obtained the steel free of a possessory mechanic's lien to which Mosher was entitled under the law of Texas.

Appellee has attempted above to set forth a fairly complete resume of the testimony which the trial court heard in an effort to give this Honorable Court, insofar as is possible from the dead record, a feeling for the testimony as it evolved and an understanding of the reasons why the Honorable Trial Judge evaluated the conflicting testimony as reflected in the court's Findings of Fact.

In its argument under Point I Union reiterates some, but by no means all or even a substantial part, of Page's testimony and complains that the trial court credited Moore rather than Page even though Moore was still employed by Mosher and Page had been summarily fired in a questionable fashion by Union. It is believed that the full statement of Page's testimony cited above will convince this court, as

it apparently did the trial court, that Mr. Page was, in most important instances, not credible, and that Moore and the other Mosher witnesses not only were telling the truth but knew what they were talking about. Insofar as the witnesses are concerned, the trial court's Findings of Fact were clearly derived from having had "experience with the mainsprings of human conduct." *Lundgren v. Freeman*, 307 F. 2d 104, (9 C.A.) 1962; Rule 52(a) F.R.C.P.

As pointed out, not only was Page's testimony contradictory of his depositions, but contradictory from minute to minute on the stand. The testimony, of course, is by no means all upon which the court based its Findings. Not only was Mr. Moore confirmed in large part by the testimony of Mr. Morton, Mr. Vernon John and Messrs. Burton and Mitchell, but the record, letters and memoranda, far from confirming Page's position, overwhelmingly confirm and support that of Moore. For example:

1. Joint 50, the letter dated November 15, 1961, Harle of Graver to Burton of Mosher, wherein Harle, after talking with Page, wrote Mr. Burton, "I spoke to John Page and he agreed that the letter should be in Mr. Moore's hands today or tomorrow." The rest of Mr. Harle's letter concerns not only the first shipment, but materials due to be shipped November 20, November 27 and thereafter. It can only be concluded that Page had told Harle that he had, or would forthwith, send a letter confirming Graver's responsibility for the *entire account, not just for one shipment*.

2. Joint 25, the telegram dated December 6, 1961, from Harle of Graver to Wright of the Joint Venture, asking that Vernon John send the letter which Harle had seen in Wright's office on November 14, and requesting that the letter bear the same date as the original (November 13).

3. Joint 61, a letter signed by Tom Harle of Graver and written to Frank Wright, of the Joint Venture, dated November 30, 1961, subject "Mosher Steel Co.", in which he informed Wright, "You may recall that Mr. John *worked out* an arrangement with Mr. Page of Graver and Mosher Steel for *payment* of the invoices 'when due'."

4. Joint 24, the memorandum from E. F. Feurt of Graver to J. P. Trytten of Graver, dated December 12, 1961, subject "IMI-Ward Guarantee, Mosher Steel Co.", in which the procedure for payment of Mosher is set forth in detail for *payment by Graver direct* upon the receipt of certification from the Joint Venture that the material had been received and the invoice was approved for payment, with the *positive* statement that, "The disbursements will be made on the following schedule:

December 1961	\$ 50,000
January 1962	100,000
February 1962	100,000

and stating that he had asked Mr. John to send Mosher's first invoice and that Vernon John had promised to send it to him. This document also contains a memorandum to the effect that Clark Root the *President of Graver (R. 816)* had agreed. (Trytten dep. Pl. Ex. 36, p. 357).

After complaining of the trial court's choice of Moore and the other witnesses and documents over Page, Union states the use of the word "enlarged" instead of "confirmation" in the letter which Trytten prepared for Union on December 12, which was never sent (Jt. Ex. 21), is exceedingly significant because it was prepared for private circulation and consideration by Graver's officers. It may be doubted that, in drafting the letter, Trytten was vitally concerned with whether he was enlarging a guarantee or confirming one, but *the great and overwhelming significance*

of the letter is that on *December 12* an entire group of officers of Union, without one word of demand from Mosher since the conversation between Moore and Page on November 15 and the telegram sent to Moore on that date, were proceeding none the less through the letter and memo of the same date to carefully carry out the commitment which Page had made to Moore on November 15, almost a month earlier, and while the letter which was never sent used the word guarantee it is quite clear from Jt. Ex. 24, the memo of procedures for carrying out the agreement with Mosher, that Union was to pay Mosher *direct* and *deduct* the same from the Joint Venture *contract* in accordance with the Vernon John letter (Jt. Ex. 26). In fact, it is obvious that the preparation of Jt. Ex. 24 was triggered by the receipt of the Vernon John letter and the memo contains the statement that "If Mosher's prices are the same, or less, than those of IMI-Ward, no deduction would be made from our payments to IMI-Ward. We would deduct only the excess cost, if any." While the memo was triggered by the receipt of the Vernon John letter the *obligation to Mosher* resulted from the agreement made by Page with Moore which was obviously known to Union's officers who were carrying out the Page agreement.

Finally, Union complains that the \$22,700 of liability for work done on the steel destined for Vandenberg was simply tossed in by the trial judge, and Union's complaint in this regard results solely from a question and answer propounded to Mr. Moore with respect to whether, in a specific telephone conversation, *Moore had told Page* that Mosher had agreed to do the Vandenberg work. Moore forthrightly answered that he had not told Page that in that telephone conversation, and since nobody else in Mosher had talked to Page that nobody in Mosher had told Page that Mosher had agreed to perform the Vandenberg work. This is cer-

tainly slim evidence upon which to base the proposition that the Page-Moore agreement of November 15 referred only to Davis-Monthan and not also to Vandenberg, and yet it has led Union throughout its brief to refer to the Page commitment as a commitment involving "Davis-Monthan."

In the first place, at the time when the telephone conversation between Page and Moore occurred, Mosher had indeed not yet agreed to perform the Vandenberg work because the agreement to perform the Vandenberg work under Jt. Ex. 10 depended upon Union's agreement to pay. Thus it would have been most unusual if Mr. Moore had told Mr. Page that Mosher had agreed to perform the Vandenberg work. Set forth against the inconclusiveness of what Moore *didn't* say on pages 31 and 32 of Union's brief is the fact that the Vernon John letter (Jt. 26) and Jt. 20, to say nothing of the unsent letter itself, Jt. 21, all confirm that the Vandenberg and Davis-Monthan jobs were at all pertinent times considered together. Of course, the testimony by Mr. Moore that he asked for and received a commitment for the entire account, so often stated in the record by Mr. Moore and others, certainly stands for the proposition the parties were discussing the Vandenberg matter along with Davis-Monthan because the assurances required and received were in relation to both purchase orders issued by the Joint Venture (Jt. Exs. 9 and 10). Thus the conversation between Moore and Orr and Morton of the Joint Venture on November 13 dealt with both jobs, and it is obvious that the ensuing conversations between Vernon John and John Page and all of the conversations and letters leading up to the conversation between Page and Moore on November 15 included the Vandenberg work. As we said, this is also supported by the documentary evidence listed above.

Next Union takes the position that even though Moore's testimony is the truth, and the many documents and other testimony supporting it are true, nevertheless the agreement was not a "direct" contract but a guarantee or agreement to pay in the event the Joint Venture failed or refused to pay and that this agreement was not to be deemed operative unless or until "given final approval" in writing. In support of this line of reasoning Union quotes three or four instances during the two depositions of Mr. Moore and during the testimony of Mr. Moore on the stand which consumes pages 350 through 460 of the reporter's transcript in which Mr. Moore used the word "guarantee" in characterizing the requirement *which he made of Union* in connection with the Tucson and Vandenberg jobs. Regardless of the word which Mr. Moore used to characterize his requirements, it is entirely clear that Mr. Moore *expected to be paid direct* by Union. It is also quite clear that regardless of the words used by Mr. Moore to characterize *his requirements of Union*, the fact is that *Union and the Joint Venture agreed*, for various reasons of their own, that IMI-Ward would have to agree, and did agree, that Union would pay Mosher *direct* and *deduct* the payments from the Joint Venture contract price, *and it was exactly this method which Page in turn agreed upon with Mr. Moore*. In this way, the Mosher matter could be handled exactly as had the purchases of Graver supplied material, not as an offset to progress payments presented by the Joint Venture to Union, but as a reduction in the contract price itself. In this way, the parties avoided any problems related to the assignment of any progress payments to the United California Bank. Furthermore, regardless of the sometime characterization and the non-legal use of the word "guarantee" by Mr. Moore, when he was cautioned on the stand that he should tell the court as close as he could remember, the exact words Mr. Page used on the telephone on Novem-

ber 15 (which request was joined in by Union's counsel) his exact statement is as follows:

"A. I don't know as I can give you word by word that was spoken at all, but I did tell Mr. Page that we were practically ready to make the first shipment on this and we had to have something definite about the payment for the fabricated material. And I asked him if he had gotten approval from Mr. Morton for them to pay us direct and deduct it from the contract. He said that he had talked to Mr. Morton and Mr. Morton had given him approval. And he stated that he would write me a letter in a day or two giving, outlining this agreement by Mr. Morton for the payment of the material." R.T. 362

Finally, again seeking critical words in oft-repeated testimony and exhausting cross-examination of Mr. Moore, in which the specific wording was much more significant to Union's counsel than it was to Mr. Moore, Mr. Moore said, in one statement made, that Page said that he would write Moore a letter in a day or two "giving final approval on this agreement." In discussing the same matter he had also characterized the promised letter as "outlining this agreement."

Union, in its brief, has seized upon the words "final approval", mentioned once in Moore's testimony, as being absolute proof that Moore did not consider that Page's promise to pay direct in accordance with Page's understanding with Morton was an absolute commitment, but that somehow there was some doubt that the "final approval" would come and that therefore this letter was a condition precedent to the contract.

Nothing could be further from the truth. When questioned *specifically* about the letter and its meaning it was quite clear that Moore, as a result of his conversation with Page, did not consider that the forthcoming letter was to be anything other than a written confirmation of Page's oral agree-

ment. See pp. 40-41 above in this brief for a quotation of Moore's testimony in this regard.

The telegram which Page sent to Moore immediately following the November 15 conversation, insofar as it referred to the promised letter, reads as follows: "Complete details will follow in letter early next week." (Jt. Ex. 22). There was certainly nothing in that language which did anything but confirm Moore's understanding that the letter promised by Page would indeed be forthcoming. And neither Moore nor Page considered that the letter which was merely to contain the *complete details* was a condition precedent to the agreement made by Page on the telephone. See page 41 above in this brief for a statement of Moore's testimony relating to the letter mentioned in the telegram.

Of course, there were really no "details" to be worked out in view of the fact that there was no problem relating to the purchase orders or the authorization by the Joint Venture to Union contained in the Vernon John letter. The agreement between Page and Moore related to payment only. Remember that Vernon John testified that the letter of *November 13* (Jt. Ex. 26) was sent pursuant to discussions with *Page*. The \$225,000.00 figure mentioned in the Joint Venture letter to Page (Jt. Ex. 26) is stated in that very letter as being only an *approximation*. It was clearly not intended to limit the authority.

In its Argument under Point I, pages 33 through 41 of its brief, Union first cites a number of cases for the proposition that *matters of law* may be reviewed by the Appellate Court, a proposition which need not be belabored; including a statement "When a finding is essentially one dealing with the effect of certain transactions * * * rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings should not be set aside, unless clearly erroneous, but is free to draw its own conclusions."

Next Union cites numerous cases and texts for the authority that where the parties negotiate *with the intention* that they are not to be bound until a formal written document is signed, the signing of the formal written document is a condition precedent to a binding contract. Other cases are cited for the proposition that this is also true with respect to an oral promise to sign a written guaranty as requiring a confirmation in writing in order to satisfy the Statute of Frauds.

Of course, all these cases including the case upon which Union places its greatest emphasis, that of Merritt-Chapman & Scott Corp. v. Gunderson Bros. Eng. Corp., 305 F. 2d 659, C.A. 9 (1962), concern themselves with the legal result where the parties were in the process of bargaining and *had not yet reached an agreement*, or where, of course, the Statute of Frauds requires a written contract.

Thus, Union, in citing these numerous cases, ignores or misses the fundamental point, which is that the Trial Court in this case has found *in resolving disputed facts* as follows:

1. That on November 13, 1961 Vernon John addressed a letter to Page authorizing Graver to pay Mosher's invoices direct and to deduct the amounts from the IMI-Ward sub-contract price on the Tucson and/or Vandenberg AFB sites, and that Page had requested John to write him a letter of this nature (Finding of Fact 34, R. 1231).

2. That on November 15, 1961 Page informed Moore that he had obtained clearance for Graver's paying Mosher directly and that Graver would make payment to Mosher directly with deduction being made from the IMI-Ward contract and that Page would write Moore a letter to this effect (Finding of Fact 35, R. 1231).

3. That on November 15, *prior* to the telephone conversation between Moore and Page Harle had sent Page a TWX (Jt. Ex. 45) and had also talked with Page by telephone.

That Page had informed Harle that Page would take care of the problem relative to the credit, and Harle, on the same date, wrote a letter to Burton of Mosher stating that the letter from Page should be in Moore's hands on November 15 or November 16 and issuing specific instructions regarding how the steel fabrication work and its delivery should be accomplished (Jt. Ex. 50; Finding of Fact 36, R. 1231-1232).

4. That *prior* to Page's conversation with Moore on November 15 Page *knew* that Mosher sought a guarantee of the whole account and in the telephone conversation as well as the telegram Page *intended* that Moore understand that the letter was to relate to the entire fabrication job (Finding of Fact 38; R. 1232).

5. That by reason of Moore's telephone conversation with Page on November 15, 1961 and the telegram from Page of that date Moore *understood* and *had reason to understand* that Graver would pay Mosher *directly* for *all* the work described in Jt. Exs. 9 and 10 and that this resulted in Mosher's release and shipment of the steel fabricated pursuant to Jt. Exs. 9 and 10 and that but for this statement by Page on November 15 and his ensuing telegram, Mosher would not have accepted IMI-Ward as its customer and would not have proceeded with the work (Findings of Fact 38 and 39; R. 1232 and 1233).

6. That in agreeing to pay Mosher directly Graver through Page, *acted primarily* to protect and advance *its own interests* under its subcontracts with Fluor and Matich Bros. & Sundt. (Finding of Fact 40, R. 1233).

7. That after Page was terminated, other officials of Graver *knew that Page had informed Moore* that Graver would make payment directly to Mosher and that Mosher was proceeding with the work in reliance upon Page's statement to Moore (Finding of Fact 44; R. 1234 and 1235).

8. That the sending to Mosher of the letter mentioned in Page's telegram of November 15, 1961 *was not intended by Page to be a condition precedent* to Union's agreement or obligation to pay Mosher (Conclusion of Law No. 7, R. 1238 and 1239).

A reading of the testimony outlined above in this brief and of the reporter's transcript will certainly make it clear that the court, in the above Findings of Fact resolved disputed facts, which findings are not only not "clearly erroneous", but are substantiated by the overwhelming preponderance of the evidence. In the Merritt-Chapman & Scott case, *supra*, emphasized by Union, the court says, at page 664 "This case bristles with indicia of negotiation."

There were certainly no indicia of that sort in this case. In this case, the entire agreement with respect to payment was complete in the conversation between Page and Moore on November 15 and the letter which Page was to send was merely to document the agreement, and the court has so found in its findings as to the intent of the parties.

Union assigns great importance in the Trial Court's findings to the fact that Harle had numerous contacts with Mosher's officers, and cites, for the proposition that these dealings between project managers and others concerning the performance of construction contracts are not sufficient to form the basis for contractual relationships, the case of Fidelity & Deposit Company of Maryland v. Harris, 360 F. 2d 402 (C.A. 9, 1966). It will be recalled that Harle, in addition to being expeditor, was also Director of Purchases. We find nothing in the Court's findings or conclusions to support the proposition that the Court relied heavily upon Harle's contacts as expeditor with Mosher's officers as forming the basis for Union's promise to pay. In the Fidelity & Deposit Company case *the trial court had found that no contractual relationship existed*, and this court, in upholding

that finding, observed that “There is an *obvious distinction* between dealings relating to the performance of his work with a person whose relationship to the prime contractor is too remote for Miller Act coverage, and *conversations or conduct from which an inference of a promise to pay would be warranted.*”

Under heading B (2) of its Argument under Point I, Union takes the position that its obligation was, after all, a promise to answer for the debt or default of the Joint Venture and was therefore required to be in writing under the Statute of Frauds.

In considering this proposition it should be remembered that the trial court, supported by ample and overwhelming evidence determined that: (1) The impetus, and indeed requirement, which caused the Joint Venture to seek additional fabricators for the performance of the missile site jobs came initially from Union. (2) Facts were found upon which a contract could be predicated between Union and Mosher for performance of the work applicable to Tucson prior to the request by the Joint Venture that Mosher accept its purchase orders, a contract based upon the October 13th meeting between Wilson, Mitchell and Burton and the letter agreement dated October 16th; that both Union and Mosher had commenced performance of that contract prior to October 31st, Union having forwarded steel belonging to Union, and so stenciled, to Mosher's plant for fabrication and Mosher having commenced its work thereon. (3) The request made by Holmes and Orr on behalf of the Joint Venture on October 31st was that Mosher accept the Joint Venture's purchase orders *for convenience of accounting and administration of the projects*, to which request Mosher *would not, and did not, accede, until Union's obligation to pay Mosher direct had been received in the telephone conversation with Page on November 15th*, and that the acceptance of the Joint Venture purchase orders *was conditioned*

upon and occurred at the same time as did Union's obligation. (4) The primary purpose of Union in obligating itself to pay Mosher direct was its own interest rather than the interest of the Joint Venture.

Thus, Union's obligation in this case was, *in its own terms direct*, rather than collateral; was created coincidentally with the obligation of the Joint Venture; and was made by Union primarily for its own advantage. This latter, not only because Union was contractor to Fluor and Matich Bros. & Sundt, but, in addition, because it had initially been bound with respect to the Tucson job and its steel in the hands of Mosher was subject to a lien in Mosher's favor for the fabrication work done.

In addition, there are, of course, several written instruments which document the obligation to Mosher, albeit not delivered to Mosher.

Frankly, the *terms* of the Union obligation as explained by Page to Moore and so fully supported by other testimony and numerous letters and memoranda, as pointed out above in this brief, would certainly appear to make a comprehensive research of the law relating to the Statute of Frauds unnecessary, because the contract was clearly by its own terms a direct obligation and not an obligation to answer for the debt or default of the Joint Venture.

Union, however, has seen fit to argue the matter, and it is submitted that the following brief on the subject clearly substantiates the proposition that, even if the obligation *had* been (which it was not) in its terms to answer for the debt or default of the Joint Venture, nevertheless, under the facts outlined above, the Statute of Frauds could not be used to defeat Mosher's claim against Union.

The Restatement of the Law of Contracts states as not being within the Statute:

"A Promise, the Consideration of Which is Desired for the Promisor's Advantage.

“Where the consideration for a promise that all or part of a previously existing debt of a third person to the promisee shall be satisfied is in fact or apparently desired by the promisor mainly for his own pecuniary or business advantage, rather than in order to benefit the third person, the promise is not within Class II of Section 178, unless the consideration is merely a premium for the promisor’s insurance that the duty shall be discharged.” *American Law Institute, Restatement of the Law of Contracts, Section 184.*

One of the illustrations given under Section 184 of the Restatement refers to a situation involving the construction of improvements, as follows:

“D contracts with S to build a house for S. C. contracts with D to furnish materials for the purpose. D, in violation of his contract with C fails to pay C for some of the materials furnished. C justifiably refuses to furnish further materials. S orally promises C, that if C will continue to furnish D with materials that C had previously agreed to furnish, S will pay the price not only for the materials already furnished but also for the remaining materials if D fails to do so. S’s promise is enforceable.”

The above quoted section of the Restatement states the law as it applies to the relationships of owners, contractors, and subcontractors in virtually all the States. Even those States which do not specifically ascribe to the “Main Purpose Rule” embodied in Section 184 of the Restatement, nevertheless hold that the promise of the owner or prime contractor, to induce a materialman or laborer to supply materials to, or perform work for, a subcontractor, in furtherance of a construction project is an *original* undertaking based upon a separate and distinct consideration and is, therefore, not within the Statute of Frauds.

Such is the law in the State of *Illinois*:

The earliest Illinois case found is *Clifford v. Luhring* (1873), 69 Ill. 401, in which the Statute of Frauds was held not to apply where:

“It appears the contract for the whole work on the building was let by defendant to one Gruis, of whom plaintiffs were sub-contractors, and on his failing to perform his contract with them, they testify they made known the fact to defendant, and informed him they would be obliged to quit the work, when he told them to go on, and he would pay.”

The plaintiff was a plasterer and the reason given by the court for holding that the obligation was an original undertaking, resulted from the fact that the defendant's object was to promote an interest of his own, as follows:

“* * * Here, the object and purpose of defendant were to have the plastering speedily finished, that he might rent the building, and thus derive income from it. This was the motive.”

Again in *Schoenfeld v. Brown* (1875), 78 Ill. 487, it was held that the owner's oral promise to pay a subcontractor was not within the Statute of Frauds, saying:

“* * * We should, therefore, give the Statute of Frauds a less rigid application than had appellant had no interest in, or benefit growing out of, the contract.
* * *”—At Page 491.

In a more recent case, *Whiting v. Gilchrist* (1950), 339 Ill. App. 511, 90 N.E. 2 288, it was held that the Statute of Frauds did not prohibit an oral agreement by a creditor who took over operation of a mine to pay back wages:

“* * * knowing that if he could persuade men to continue working, he might be able to reimburse himself for money loaned to the original employer * * *”

In *Wickham v. The Hyde Park Building and Loan Association* (1898), 80 Ill. App. 523, it was held that an oral

promise, supported by a consideration for the benefit of a third person, was not within the Statute of Frauds, and:

“It is not necessary to the validity of a promise made for the benefit of a third person that the original debtor should be discharged.”

In *Wilson v. Bevans* (Sup. Ct. Ill., 1871), 58 Ill. 232, the court held that an oral agreement by the defendant to pay the debts of a third person, made in connection with the defendant's purchase from the third person of certain articles of personal property and an interest in a lease, was valid despite the Statute of Frauds because a valuable consideration was received by the promisor himself and created a contract for the benefit of a third party, saying:

“The general rule is, if a promise is in the nature of an original undertaking to pay the debt of another, and is founded on a valuable consideration received by the promisor himself, it is not within the statute, and need not be in writing to make it valid and binding,—it will be regarded in the light of a contract for the benefit of a third party, upon which such third party may be found an action for the breach.

“So, where a purchaser of property agreed by parol, in consideration thereof, to pay certain debts of his vendor due to a third person, it was *held*, the promise was in nowise collateral to or dependent on the liability of the vendor, but was an original and independent promise, and not within the Statute of Frauds.”

Again, in *Rothermel v. Bell & Zoller Coal Co.* (1898), 79 Ill. App. 667, it was held that an oral promise by an individual to pay a company's debt was valid, notwithstanding the company had not been released by the creditor, for the reason that there was sufficient consideration for the promisor's undertaking and that the creditors could take advantage of his agreement made for their benefit without releasing their claims against the original obligor.

In *Holmes v. Suffrin* (1916), 198 Ill. App. 45, it appeared that the defendant was the owner of a building and had contracted for the remodeling and improving of his building. The contractor had in turn made a subcontract with plaintiffs. The contractor failed to pay the plaintiff subcontractor and the defendant promised:

“* * * in case the plaintiffs would proceed with and complete the work they had undertaken to pay them the amount due and to become due, and that this was a direct and original promise and not within the Statute of Frauds; * * *”—At Page 46.

It further held that:

“A valid oral promise may be made with regard to the debt of a third person without releasing the original debtor.”

This decision of the court was rendered despite the fact that the plaintiff had charged the account on its books to the prime contractor, holding that this fact was not conclusive as to whether the promise was direct and original or collateral.

Such is the law in the State of *New York*:

The same rule that:

“Where one working by the day for a subcontractor continues the work on the agreement of the contractor to pay him, this is an original undertaking on a sufficient consideration, which need not be in writing.”
Snell v. Rogers (1893, N.Y. Sup. Ct.), 24 N.Y. Sup. 379.

In Ohio, the Supreme Court of Ohio, in *Crawford v. Edison* (1887), 13 N.E. 80, adopts the theory of *Clifford v. Luhning* (Ill.), supra, in holding that an oral promise by an owner to pay a subcontractor to induce the subcontractor to complete the job after the contractor had abandoned the job, was not within the Statute of Frauds because:

“When the leading object of the promisor is not to answer for another, but to subserve some pecuniary

or business purpose of his own, involving a benefit to himself, or a damage to the other contracting party, his promise is not within the statute of frauds, *although it may in form a promise to pay the debt of another*, and its performance may incidentally have the effect of extinguishing that liability."

Such is the law in the State of *Arizona*:

In *Roy & Titcomb v. Flin* (1906, Sup. Ct. Ariz.), 85 Pac. 752, the court held that a surety upon a contractor's bond (Roy & Titcomb) which had been required to complete a construction contract, was liable upon an oral contract with a subcontractor of the defaulting general contractor, to pay a debt due the subcontractor from the general contractor because it was given as an inducement for the resumption of work by the subcontractor at a time when the subcontractor was under no legal obligation to proceed, and was founded upon a consideration beneficial to the promisor, saying:

"* * * The promise of one person, although in form to answer for the debt of another, if founded upon a new and sufficient consideration, moving from the creditor and promisee to the promisor, and beneficial to the latter, is not within the statute of frauds, and need not be in writing, subscribed by him, and expressing the consideration."—At Page 726.

In a later case, *Steward v. Sirrine* (Sup. Ct. Ariz., 1928), 267 Pac. 598, it was held that an oral contract by the purchaser of land that he would pay the balance due plaintiff from the previous owner on a mortgage, was not within the Statute and announced the rule in Arizona, as follows:

"* * * The rule has frequently been announced that where the leading object of a party promising to pay a debt which was originally that of another is to protect his own interest and not to become the other's guarantor, and such promise is made upon sufficient consideration, it is valid although not in writing."

Such is the law in *Texas*:

In an early case, *Green v. Dallahan & Co.* (1881), 54 Tex. 281, the Supreme Court found that a contractor came to the plaintiff's lumber yard to order lumber to construct a house for the defendant, that the plaintiff refused to let the contractor have the lumber unless the defendant would agree to pay for it. The defendant at first refused to pay for the lumber, saying that he had made a contract with the general contractor for a fixed sum, but, when the plaintiff remained adamant, the defendant told the plaintiff to furnish the lumber to the general contractor and he, the defendant, would pay for it.

Under these facts, the court found that the defendant's agreement was not collateral to that of the general contractor, but was an original one and within the Statute of Frauds, and that the fact that payments made to the plaintiff:

"* * * were upon the orders of Durland (general contractor) is not inconsistent with this view, as on final settlement between Green and Durland they would be vouchers against the latter."—At Page 286.

In *Lyon v. Lindsay* (1897, Tex. Civ. App.) 39 S.W. 1101, it was held that:

"Delivery to a contractor of materials necessary to perform the contract inures to the benefit of his sureties for such performance, and therefore a promise of the sureties to be responsible, on which the materials were delivered, is not within the Statute of Frauds."

In *Harp v. Hamilton* (1915, Tex. Civ. App.), 177 S.W. 565, it was held that the oral promise to pay pasturage for cattle, due from another, to induce the creditor to release possession of the cattle and the lien thereon, was an original promise not within the Statute of Frauds, even though not extinguishing the original indebtedness.

That a direct benefit to the promisor will take an oral promise out of the Statute of Frauds, is still the law of Texas. In *Dallas Title & Guaranty Company v. Jarrell* (1959) (Tex. Civ. App.), 320 S.W. 2d 696, it was held that an oral promise by a title company to pay a retailer of fixtures ordered by a house builder was not within the Statute of Frauds, in view of the benefit derived by the title company in supervising payments of outstanding bills on closing, and the protection of the title company from the possibility of future mechanic's liens.

In *Wells-Grinnan M.A.B. v. Belton Sand and Gravel Co.* (1956) (Tex. Civ. App.), 293 S.W. 2d 70, it was held that an oral agreement to pay a subcontractor made by a prime contractor, who had a contractual obligation to furnish the materials, was not within the Statute of Frauds because the prime contractor had pledged his own credit and made himself directly liable.

In *Grammar v. Builder's Brick and Stone Company* (1955) (Tex. Civ. App.), 277 S.W. 2d 185, it was held that land-owner's oral agreement to pay materialmen for materials purchased by another was an original, rather than a collateral, undertaking supported by a valid consideration (the failure to file a lien upon the land) and, hence, not within the Statute of Frauds.

Such is the law in the State of *California*:

There also it is the rule than an oral contract to pay past due indebtedness of another is not within the Statute of Frauds, where it is based upon a consideration that was beneficial to the promisor. In *Behannesey v. Paton* (1928) (Sup. Ct. Calif.), 264 Pac. 763, it was held that a company financing a motion picture, after taking over production, was held liable on its oral promise to pay for properties contracted for by the original producer, since the plaintiff was induced thereby to complete the contract.

Again in California, in *Michael Distributing Company v. Tobin* (1964) (D.C. App.), 37 Calif. Reporter 518, the court reiterated that the California Supreme Court had approved the "main purpose" or "leading object" rule. It was held that an individual, who owned 51 per cent of the capital stock of corporations which were building a housing project, could be held liable upon an oral contract to pay suppliers of material, even though the individual had agreed to pay the amount:

"* * * through the corporations rather than to plaintiff direct * * *"

and that:

"* * * the pecuniary benefit which the individual hoped to reap from the success of the housing project, was the main object of his promise * * *" — At Page 524.

The courts stated the rule as follows:

"The purpose of the statute of frauds was to prevent, not effectuate, wrong. Were it not for the statute, verbal contracts of the type in question would be upheld, since they have both promise and consideration. However, there the alleged promisor is an absolute stranger to the transaction, and without interest in it, the obligation of the statute will be strictly upheld.

"* * * But cases sometimes arise in which, though a third party is the original obligor, the primary debtor, the promisor has a *personal, immediate, and pecuniary interest* in the transaction, and is therefore himself a party to be benefited by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise * * *" (Emphasis added by court.) At Pages 523-524.

The law in Illinois, Arizona, Texas, and California is also the law in virtually all American jurisdictions:

In Massachusetts, with respect to an owner's oral agreement to pay for work done and to be done, see *Greenberg v. Weisman*, (1963) (Sup. Ct. Mass.), 189 N.E. 2d 531.

The Tenth Circuit in 1960, in *Abraham v. Middleton*, 279 Fed. 2d 107, was faced with a situation in which the oral promise was literally to pay the debt of another, but held where the main object of the promisor is:

“* * * ‘to subserve a pecuniary or business purpose of his own * * *’”

it is not within the Statute of Frauds. In that case, the defendants owned mineral interests adjacent to a tract upon which they had made a farm-out agreement, and therefore defendant's oral promise to pay costs of drilling undertaken by others and an agreement which would redound to their financial benefit if a well were drilled, was made primarily for defendants own business benefit and defendants received new and beneficial consideration, namely drilling of the well. The court quotes Mr. Justice Brewer to the effect that the purpose of the Statute of Frauds is:

“* * * that a promisor *receiving no benefits* should be bound only by the exact terms of his promise * * *”

Again, the Supreme Court of Washington in *Frietag Manufacturing Company v. Boeing Airplane Company*, held that:

“A complaint alleging that plaintiff supplied materials to subcontractor in construction of a supersonic tunnel for airplane company by reason of fact that agents of company and general contractor assured plaintiff that plaintiff would be paid and that it was at their urgent request that plaintiff agreed to fill the purchase orders of subcontractor was not demurrable on ground that such promise was barred by statute of frauds, since allegations were sufficient to support finding that assurances of company and general contractor were given to secure a benefit to themselves, a tech-

nically satisfactory and expeditious construction of the needed parts, and there was no allegation to show that they had any motive or purpose to benefit the subcontractor." 347 Pac. 2d 1074, — At Page 1075.

In Illinois, a case very similar on the facts to the case at hand is *Granite City Lime and Cement Company v. The Board of Education of School District No. 126, et al.*, 203 Ill. App. 134.

In that case one Beale (prime contractor) entered into a contract with the Board of Education of School District No. 126 (owner) for the erection and completion of a high school building. Thereafter, Beale entered into a subcontract with Mettlen to furnish building material and brick work for an expressed consideration. Thereafter, Mettlen placed an order with the plaintiff for the necessary brick and other building material. After Mettlen had placed the order, and before any material had been delivered, plaintiffs learned that Beale and Mettlen had agreed that Beale would pay for the materials furnished and the Chancellor found that Beale agreed, before the material was delivered, to pay for it, and that the material was furnished upon the strength of the promises of Beale. *Despite the fact that plaintiffs delivered the materials to Mettlen and recognized Mettlen as subcontractor and charged the goods to Mettlen upon their books, nevertheless, the promise of Beale was held to be an original undertaking, and Beale was liable upon such promise.*

It is interesting to note that the plaintiffs sued the Board of Education, Beale, and Mettlen. It was also contended by Beale that, the materials having been furnished to a *sub-contractor* under the mechanic's liens statute, the plaintiffs had no right to a lien upon the building. The court found that the mechanic's lien was properly available to the plaintiff under the circumstances. The court said:

"* * * It does appear from the evidence in this case that after the contract was made between Beale and

Mettlen & Company and after Beale had promised that he would pay for the materials furnished, that Mettlen & Company did give orders to appellees (plaintiffs) upon which they received payment, and that when appellees gave their first notice they referred to Mettlen & Company as subcontractors and did other things by which they recognized Mettlen & Company as subcontractors, but if they had a contract with appellant that he was to pay for the materials furnished, the mere fact of their having recognized Mettlen & Company as subcontractors afterwards and that the goods were charged to Mettlen & Company upon the books of appellee would not necessarily deprive them of their rights under the promise of Beale to pay for the materials.

* * * * *

“After a careful consideration of all of the evidence, facts and circumstances in this case, we are of the opinion that the Circuit Court was warranted in finding that under the agreement and conduct of the appellant (Beale) that *there was an implied request upon his part to furnish the building material that was furnished* and used in the construction of the building, and that the appellee and the said McEwing & Thomas Clay Products Company are entitled to their lien under this statute, and the decree of the lower court is affirmed.”

In *Lusk v. Throop* (Sup. Ct. Ill.) 59 N.E. 529, the Supreme Court of Illinois held that where a contractor told a grocer to supply certain subcontractors with what supplies they wanted and he would pay for them, such promise was an original promise and not a promise to answer for the debts of another within the statute of frauds, despite the fact that the groceries were charged upon the plaintiff's books to the subcontractor and despite the fact that the plaintiff had taken notes and mortgages from the subcontractor.

Finally, with respect to sections of the Statute of Frauds not relating to the promise for the debt or default of another (although in some States, and apparently Illinois, there is some authority that such an agreement is also made valid, see *Spalding v. White*, 184 Ill. App. 218), complete performance by one party to an oral contract will take the contract out of the Statute of Frauds. This is based, of course, upon the ground that to do otherwise would constitute a fraud upon the performing party.

That complete performance by one party will effectively avoid the Statute of Frauds in Arizona is entirely clear. In *Wilson v. Metheny* (Sup. Ct. Ariz. 1951) 236 Pac. 2d 34, the court so held with respect to an option contract to purchase land, stating:

"It is the law in this State that either part or full performance of an oral contract takes it out of the Statute of Frauds."

This is the law of Illinois, *Fleming v. Dillon*, 18 N.E. 2d 910, the court saying:

"An oral contract, even for the future conveyance or devise of land, is not within the statute of frauds if it has been completely performed by one of the parties thereto."

This is the law of California, *Marr v. Postal Union Life Insurance Company*, 105 Pac. 2d 649, by which an oral agreement of agency, otherwise within the Statute, is taken out of the Statute of Frauds by virtue of full performance of one seeking to enforce the contract.

This is the law of Texas, *Pettus Oil and Refining Company v. Taber* (Civ. App. Tex.) 153 S.W. 2d 700, by which an oral contract for the sale of an oil and gas lease, otherwise within the Statute, was rendered not affected by it by virtue of performance by one party.

It is axiomatic that a promise to pay the debt of another out of the debtor's property or funds in the hands of the promisor, is an original undertaking not within the Statute of Frauds. See *Holmes v. Hughes* (Sup. Ct. Ariz.) (1924) 226 Pac. 424, in which the proposition is stated as follows:

"It is a case where the promise to pay the debt of another is in consideration of property or funds received from the debtor for the express purpose of paying the debt. This promise is not within the statute of frauds, as the promisor thereby makes the debt his own and incurs a primary liability to which, as the authorities say, the continuing obligation of the debtor is in a sense collateral."

The exhibits in this case, supported by the testimony tends to prove that there is a contract which is binding upon Union.

A contract binding under the statute of frauds may be gathered from the letters, writings, and telegrams of the parties in the event they express the essentials of a contract. *Hebets v. Scott*, 152 F. 2d 739 (9 CA Ariz.)

No particular form of language or instrument is necessary to constitute a sufficient note or memorandum under the statute and it is immaterial whether the writing was made for the purpose of furnishing evidence of the contract or for some other purpose. 37 CJS Frauds, Statute of Sec. 175, Page 653.

The evil the statute seeks to guard against is the use of oral evidence to prove the contract. This is obviated by the production of the memorandum the execution and contents of which satisfy the statute, albeit it was never delivered. 49 Am Jur Statute of Frauds Sec. 390, Page 692, Anno. 12 A.L.R. 2d, 508, 511

A letter or telegram sufficient as to contents and signature to constitute a memorandum satisfying the statute of

frauds, or a part of such memorandum if more than one writing is involved is held adequate for this purpose even though it is not intended for, or addressed, delivered or known to the other contracting party. 37 CJS supra. Sec. 173, Page 651

Mosher Steel Company had a mechanic's lien under the Constitution of Texas upon the steel belonging to Union for the value of Mosher's labor thereon.

This lien is created by Article 16, Section 37 of the Constitution of Texas, which reads as follows:

“Mechanics, artisans and material men, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens.”

This constitutional provision establishes a lien upon chattels as well as realty, and is self-executing, existing independently and apart from any Legislative Act. *Strang v. Pray*, 89 Tex. 525, 35 S.W. 1054.

In connection with the law of Illinois, Union cites certain cases on the subject of the applicability of the Statute of Frauds. One of these is *Heggie v. Smith* (2d Dist. 1899), 87 Ill. App. 141. It would appear that this case does not represent the law of Illinois because two years later the Supreme Court of Illinois, in *Lusk v. Throop*, (S. Ct. 1901) 59 N.E. 529, which is also cited by Union, held that where the plaintiff *relied on the credit of a contractor* in furnishing groceries to a *subcontractor*, the contractor was liable, *notwithstanding the fact that the supplies were charged on the grocer's books against the subcontractor* and he had taken security from the subcontractor, and it was a question for the jury to determine whether the plaintiff intended, by taking the notes and mortgages from the subcontractor, thereby to release the contractor.

In *Jenkins v. Lundgren*, 85 Ill. App. 494, the jury had found that the plaintiff *did not rely* on the credit of the defendant. *Bonner v. Hansel* also held that it is a question of fact as to whom credit was extended and that all of the circumstances, including the language used, may be considered as a question of fact.

Additional Illinois cases are as follows:

Peters v. Raven, 159 Ill. App. 122. This is a very informative case. The facts were that the plaintiff entered into a contract to *deliver merchandise to one Grage*. Thereafter Grage told the plaintiff to *seek payment* from the defendant *Raven*, and Raven told Peters (the plaintiff) that he would *pay all bills for goods delivered to Grage*. Peters continued to deliver goods to Grage and *charged the same to Grage*.

It appeared that Raven held a mortgage upon Grage's property. The trial court instructed the jury that it could find for the plaintiff only if the plaintiff "furnished and supplied goods, wares, merchandise and labor to said Grage, intending to hold Raven *alone* responsible * * *" and that if "* * * plaintiff did not rely *alone* upon the promise of Raven * * *" it must find for the defendant.

The case was *reversed* and *remanded* on the ground that the *instruction* to the jury was *erroneous*. The court stated the law of Illinois as follows:

"In our opinion the instruction is clearly erroneous as applied to the facts shown by the evidence. If, by reason of holding a mortgage upon Grage's property of \$4,000 or otherwise, Raven *was interested in the business and primarily to protect his own interest* promised to pay for any goods sold, delivered to, or repairs made for, Grage thereafter, *it was an original undertaking* and not merely a collateral promise to pay the debt of Grage, and *it would not be necessary* to its validity that Peters in selling the goods and making the repairs should have intended to hold Raven

alone responsible for such goods and labor. A *PROMISE SO MADE BY RAVEN WOULD BE NONE THE LESS AN ORIGINAL UNDERTAKING BECAUSE GRAGE ALSO BECAME INDEBTED.*"

Further, the Supreme Court of Illinois, in *Borchsenius v. Canutson* (Ill. S. Ct.) 100 Ill., at page 92, cited with approval the doctrine of *Clifford v. Luhring*, stating:

"* * * where the leading object of the undertaking is to promote some interest of the party's own, his promise to pay is not within the Statute of Frauds * * *",

and that:

"* * * Where the plaintiff, in consideration of the promise, has relinquished some lien, benefit or advantage for securing or recovering his debt, and where, by means of such relinquishment, the same interest or advantage has inured to the benefit of the defendant, — in such cases, although the result is that the payment of the debt of the third person is effected, it is so incidentally and indirectly, and the substance of the contract is the purchase by the defendant of the plaintiff of the lien, right or benefit in question * * *"

The Court went on to hold that an *oral promise to pay the debt of another* given to induce the plaintiff to part with an *insurance policy* which had been pledged to secure the debt of another, and in which the promisor was *financially interested*, inured to the benefit of the promisor stating:

"We are of the opinion that the promise here comes within the principle of the above decisions, and that *although in form a promise to pay the debt of another*, it is to be regarded as an *original contract*, and is not within the Statute of Frauds."

Again, in *Connelly Co. v. McCabe*, 175 Ill. App. 607, the Court held:

"The promise of one person *to pay the debt of another*, supported by a valuable consideration moving to the person making the promise, is an *original undertaking* and not within the statute of frauds."

Furthermore, in the State of Illinois, as elsewhere, where *the promise to pay the debt of another* is made prior to the *existence of the debt itself*, the promise is an *original undertaking*. In *Raveret-Weber Printing Co. v. Wright*, (Ill. App.) 23 N.E. 2d 203, the Court quoted *Resseter v. Waterman* (S. Ct. Ill.) 37 N.E. 875, as follows:

“* * * But where the defendant promises the plaintiff to pay for goods which the plaintiff may *thereafter* deliver to a *third person*, and which, *at the time of the promise*, have not been delivered, no debt exists from such third person to the plaintiff; and hence the promise of the defendant to pay is an *original undertaking*, and not merely a promise to pay the debt of another.

“According to the complaint, plaintiff did not deliver the goods and merchandise until the defendant had agreed to be responsible therefor * * *”

In its final section under Point I Union argues that as a matter of law, contrary to the Trial Court's Conclusion of Law No. 7, Union is not estopped to raise the non-sending of the letter mentioned in Page's telegram of November 15, 1961 as a defense in view of the facts set out in Finding of Fact No. 44.

The Trial Court has found that the sending of the letter was *not intended by Page to be a condition precedent* to Union's agreement and obligation to pay Mosher, and we think this finding is completely substantiated by the testimony and evidence set out above.

The court has found that on November 15, 1961 Page orally agreed on Union's behalf to pay Mosher directly with deduction being made from the IMI-Ward contract and that he, Page, told Moore that he would write Moore a letter to this effect. The court has further found that the letter which Page promised Moore was to relate to the entire fabrication job, not just the first shipment, and that the telegram of

November 15 from Page to Moore confirmed this. In so stating, the court has found that Page intended Moore to understand it would be one concerning the entire account.

In addition, the court has entered Finding of Fact No. 44 finding that, after Page's termination, other officials of Union knew of the existence of IMI-Ward's letter to Page, knew that Page had informed Moore that Graver would make payments directly to Mosher, and knew that Page had informed Moore that he would write Moore a letter to this effect. They knew also that Mosher was going ahead on the work in reliance upon its understanding from Page's assurance on the telephone and his telegram that Graver would pay Mosher directly for all the work described in Jt. Exs. 9 and 10. The court further found that these officials drafted a letter such as Page had promised but did not execute or send the same because Lancaster, Graver's Vice President, pointed out that Mosher was proceeding with the steel shipments and suggested that the matter be deferred until it was requested by Mosher.

In its argument Union takes issue with the Trial Court's findings, but as pointed out above, they are supported by overwhelming evidence. Secondly, ignoring the findings that the agreement between Union and Mosher was direct and ignoring the law cited above which would render the Statute of Frauds inoperable even if the undertaking had been collateral, which it was not, Union cites a series of Illinois cases wherein the courts have at times at least, prevented the application of equitable estoppel "** * ** where an individual is charged with having failed to comply with an oral agreement rendered unenforceable by statute or to honor his verbal promise to reduce *such* an agreement to writing."

In this connection, Union cites *Lowenberg v. Booth*, quoting therefrom a statement of the six elements necessary to the doctrine of equitable estoppel. While the statement

of the elements may be correct, the pertinence of the case to Union's argument is questionable, in view of the fact that in the *Lowenberg* case, the court found that there had been no "act, representation or promise, held out to Appellants—", at P. 195, and therefore, no equitable estoppel. More importantly, the *Lowenberg* case goes on to establish in Illinois the rule that "where one seeks to invoke the statute, after having by acts, representation or promises, induced another party to do or forbear the doing of any act, so that such acts or representations constitute a fraud on the other party, the statutes of frauds may not in such case be utilized as a defense—", at P. 195. Thus the case actually holds that the statute of frauds may not be availed of where acts, representations, or promises have misled the other party. Again, in *Ozier v. Haines*, cited by Union, the court found that there was *no misrepresentation or concealment*, and that while this was *not ordinarily necessary* to implementation of equitable estoppel, under the peculiar circumstances where the statute of frauds would render the agreement invalid, it was necessary that estoppel *must* be based upon representation or concealment. The court reiterated the law of Illinois that, under circumstances involving misrepresentation or concealment, the statute of frauds would *not* be allowed to create inequity, and could not be raised by way of defense, citing numerous cases in Illinois.

Finally in *Sinclair v. Sullivan Chevrolet Company*, cited by Union, the Supreme Court of Illinois, 202 NE 2d 516, the court again reiterates that equitable estoppel, if based upon misrepresentation or concealment, will indeed render the statute of frauds unavailable to the Defendant, but held that in the *Sinclair* case, "there appears to have been no concealment or misrepresentation of fact", at P. 519.

Thus the Illinois cases cited by Union *support* rather than refute the proposition that, if the undertaking by

Union had been collateral rather than direct, nevertheless the calculating concealment of Page, if it was Page's intention that he would not send the promised letter, together with the action of Union's other officers under the circumstances, would, under the Illinois law estop Union from claiming the applicability of the statutes of frauds in view of Mosher's subsequent reliance. For a statement of Page's testimony wherein he *claims* a calculated concealment, see P. 29 above in this brief.

The case at hand, of course, is not a Statute of Frauds case at all, and *the letter was not essential as a matter of law*. The letter was merely promised by Page both in his telephone conversation with Moore and in his telegram of the same date, which letter, the court has found, was merely to have reduced to writing the obligation which had been expressed orally. The letter itself was not demanded by Moore. (See p. 41 above). Neither Moore nor Page were bargaining on the telephone for the issuance of a letter. Thus, the contract expressed orally was complete even if Page had not told Moore that he would send Moore a letter. The question is whether, even if Page had intended that Union was not to be bound until he had sent the letter, which the court has found he did not, the conduct of Union under the circumstances estopped Union to contend that it was not to be bound until the letter was sent.

The six elements of actual fraud required by the *Lowenberg* case cited by Union may easily be met in this case as follows: (1) the words of Page on the telephone agreeing to pay Mosher direct and to deduct the sums from the Joint Venture contract price pursuant to Morton's approval which had already been given, knowing, as the court has found, that Moore considered the commitment to be firm, and the simple statement that he, Page, would write Moore a letter to this effect, which words and conduct were carried forward in the wording of the telegram to the effect that

“Complete details will follow in letter early next week.” constituted, if, at the time they were uttered by Page, Page intended that Union’s obligation would *not* be made until he had written the letter, a concealment by Page of material facts; (2) if Page so intended, it is clear he knew the statements were untrue; (3) it is clear, and has been found by the court that Page’s intention in this matter, if he had such intention, was unknown to Mosher both on November 15th and thereafter, and that Moore understood, and had reason to understand the contrary; (4) Page and the other Union officers, knowing of Page’s agreement, clearly knew that Mosher would and did act in reliance upon Page’s agreement; (5) such agreement was in fact acted upon by Mosher, as the court has found, and (6) Mosher acted thereon because of such agreement and would be prejudiced if Union were permitted to claim that the sending of the letter was a condition precedent to its obligation.

Without repeating the court’s Findings of Fact No. 44, it is submitted that the Trial Court was amply supported in the proposition that the conduct of Feurt, Trytten, Root, Lancaster, et al, after December 12th, considering their knowledge of the situation, constituted conduct with respect to the sending of the letter which clearly estops Union from claiming that the sending of the letter was a condition precedent to Union’s obligation. Under the circumstances these officers of Union were *under a duty to speak up* if they considered that Union was not bound until a letter was sent. This they *did not do* even though they knew that Mosher was continuing performance in reliance upon Page’s agreement and in fact, as shown by the Lancaster comment on Jt. 24, *the very reason* why the letter was not sent *was the fact* that Mosher was *continuing to perform*. There can be no doubt that this was fraudulent conduct under the circumstances.

Silence, when there is a duty to speak, is a well recognized basis for invoking the rule of estoppel. The elements of an "estoppel in pais" are well settled; they are essentially: conduct by which one intentionally or through culpable negligence induces another to believe and have confidence in certain material facts, which inducement results in acts in reliance thereon, justifiably taken, which causes injury to the party thus relying. *Builders Supply Corporation v. Marshall*, 352 P. 2d 982 (Ariz.).

This doctrine of estoppel in pais is founded upon principles of morality and fair dealing and is intended to subserve the ends of justice. Estoppel arises from the conduct of a party, using the word "conduct" in its broadest meaning, as *including his spoken words, his positive acts and his silence* where there is a duty to speak, and proceeds on the consideration that the author of a misfortune shall not escape the consequences and cast the burden on another. 19 Am. Jur. Estoppel, Sec. 42, p. 641

"(Estoppel in pais) holds a person to a representation made or a position assumed where otherwise inequitable consequences would result to another who, having the right to do so, under all the circumstances of the case, has in good faith relied thereon and been misled to his injury."

"A right of action on a contract and for fraud in inducing plaintiff to enter into such contract may exist at the same time, and a recovery on one of the causes will not bar a subsequent action on the other.'" * * *
"The courts of many states have recognized the rule that a suit on a contract and a suit for fraud in inducing the contract are two different causes of action with separate and consistent remedies."

See *Bankers Trust Co. v. Pacific Employers Insurance Co.*, 282 F. 2d 106 (C.A. 9th Nev.) citing 19 Am. Jur. 642, Estoppel, Sec 42

Finally, under this section, Union claims that it has already paid the Joint Venture for the work for which it is now sued by Mosher. Appellee reiterates that there is nothing in the record upon which such a statement can be made, nor is it material in this case. In its final paragraphs concerning this section Union ignores the testimony of Burton and Mitchell and then makes a most remarkable statement that "Union would have been in a perfect position to protect itself by deductions from the joint venture contract had Mosher's conduct at the time of these transactions only been consistent with its claims and contentions at the trial." The only response which Appellee can make to this complaint is that unquestionably Union *was indeed in a perfect position* to protect itself and remained in this position throughout, since the authorization contained in the Vernon John letter (Jt. 26) was never rescinded. The reason that Union did not, if it in fact did not, deduct Mosher's work from the Joint Venture contracts is simply that it refused to honor its obligation to pay Mosher.

RESPONSE TO POINT II

Summary of Argument

The agreement between Union and IMI-Ward that Union would pay Mosher direct after IMI-Ward had approved Mosher's invoices, and that the sums paid Mosher by Union would be deducted from the Union IMI-Ward subcontract, did not contemplate that Union's payments would be deducted from progress estimates billed to Union by IMI-Ward, but rather that they would be deducted from the subcontract itself. The agreement between Union and IMI-Ward, having been made known to Mosher, and Mosher having performed in reliance thereon, could not thereafter be changed to Mosher's detriment.

In Point II Union asserts that the court erred in holding that an agreement existed between Union and IMI-Ward that Union might pay Mosher for its work after acceptance

of the work by IMI-Ward, and deduct Mosher's invoices from the contract price between Union and IMI-Ward (R. 1239).

Union simply says that this conclusion by the court is completely at odds with the conduct of the parties.

At this point in the brief we feel it is unnecessary to recite the Vernon John letter, the fact that it was asked for by Union, the fact that such agreement resulted from Mosher's requirements, the fact that George Morton, the Manager of the Joint Venture, completely understood the agreement as embodied in the Vernon John letter, and the fact that Union's officers understood it that way too, wrote memoranda concerning the same and, in fact, so far as the record reveals, never rescinded the agreement except in refusing to pay Mosher. Of course, they could not rescind the agreement, after Mosher had relied upon it to its detriment.

"A contract for the benefit of a third person which has been accepted or acted on by him, cannot be rescinded by the parties without his consent."

The above quoted rule is a general rule in American jurisdictions, including Illinois; See *Pliley v. Phifer*, 117 N.E. 2d 678, and Texas. See *Mercantile National Bank at Dallas v. McCullough Tool Co.*, 250 S.W. 2 870 (Tex. Civ. App.), and *Pacific American Gasoline Company of Texas v. Miller*, 76 S.W. 2 833 (Tex. Civ. App., error refused). In *Pliley v. Phifer*, (supra) as against the contention that a new agreement had been substituted for the agreement under which the third party beneficiary sued, the Illinois Supreme Court held that the beneficiary is, nevertheless, entitled to suit upon the original contract, stating:

"Plaintiff's contention overlooks the legal relationship held in Illinois to exist between the third-party beneficiary of a contract and his promisor. * * * The

courts in this State have consistently held that the third-party beneficiary obtains *a vested right* as against the promisor, and this right, once given, *deprives* the promisor of any interest or right in the subject matter of the promise, *including the right to alter, rescind or revoke it*; nothing remains except that the promisor carry out his promise to the third-party beneficiary." at pages 681-682.

The only reasons given by Union for the statement that the existence of such an agreement was completely at odds with the conduct of the parties is said to be the fact that the Joint Venture drew invoices against Mosher's work and assigned such invoices to the California National Bank as security. Here again, there is nothing in the record to substantiate either the fact that the Joint Venture drew invoices against Mosher's work or that the Joint Venture assigned such invoices to the California National Bank.

Union presented two witnesses, Messrs. Middleton and Dean, presumably to show that it had already paid the Joint Venture for the work that Mosher did. The court permitted the testimony to be introduced subject to a later determination by the court whether it was relevant or not. It was, of course, irrelevant insofar as Mosher is concerned under the agreement embodied in the Vernon John letter of November 13 and the terms of the agreement made by Page with Moore on November 15.

There is nothing whatever in the record to indicate that the agreement to pay Mosher direct was contingent upon there being any debt from Union to the Joint Venture. In fact, the method chosen by the Joint Venture and Union involved *a reduction of the Joint Venture contract price*, just as did the cost of Graver supplied materials. Thus if Union did in fact pay the Joint Venture for the work performed for Mosher, it did so *without any approval of Mosher, in clear violation of the agreement between the Joint Venture and Union for the payment of Mosher di-*

rect and indeed in clear violation of the basic construction contract between Union and the Joint Venture, which provided, on pages 4 and 5 thereof (JT 8) that no labor would be invoiced unless it had been "in fact paid."

George Morton, the Manager of the Joint Venture, well understood the terms of the agreement evidenced by the Vernon John letter and its effect upon invoices from the Joint Venture to Union and invoices assigned to the United California Bank as follows:

"Q. If you had assigned the moneys which were due from Graver to the bank, you could not ask Graver to pay them to somebody else, could you?"

"A. No, because I don't quite understand what you're asking. If you're saying once an assignment is made to the bank, we would ask Graver not to — or to pay the moneys out, I would say no; that would be improper. However, if you are referring to the letter written by Mr. John to pay Mosher directly, I think would be done under a reduction in our contract."

"In other words, any moneys paid by Graver would be paid, and the contract reduced accordingly." (Pl. Ex. 40, Morton Dep. 2, pp. 48 and 49).

"Q. Yes. All right, let me ask you this: if your contract with the bank provided that you had assigned all the moneys there were due under this Graver sub-contract, you could not direct Graver to withhold moneys from the bank, could you?"

"THE WITNESS: Let me set Mr. McConnell straight. The contract could be modified under the terms of the contract by change orders and any other modifications. This was part of the contract."

"The contract is assigned to the bank, if you want the moneys to be — that result to be sent to the bank, would be in relation to the *modified* contracts."

"What we had authorized by this letter of Mr. John's, where we had authorized Graver to pay two hundred thousand plus figures to Mosher would have resulted

in a modification of the contract and was not an assignment of moneys, and therefore would not fall under the clause that all moneys under the contract had to go to the bank." (Pl. Ex. 40, Morton Dep. No. 2, pp. 51-52).

As we have said, there is no evidence or testimony showing that all or any part of the work done by Mosher was ever paid for by Union to the Joint Venture. There is in the record a January 9, 1962 invoice which is described as being the last invoice relating to structural steel received by Union prior to the Idaho-Maryland Bankruptcy. This related to *Item 4-E* of the Subcontract Silo Structural Steel. The closest Union could get to identifying this invoice with the Mosher work was that *Item 4-E* was the item of which Mosher Steel was supplying only *a part* as follows: "Q. That was the *item* which Mosher Steel was supplying part of? A. Part of, yes." (R.T. 594).

It does not appear anywhere in the record that the invoice of January 9 included the work done by Mosher or any part thereof, since others than Mosher were also performing work under *Item 4-E*. Another document was introduced which showed a lot of checks, no one or more of which could be identified as having been checks in payment of Mosher's work, or of the January 9 invoice.

In fact, in December of 1961 Frank Wright, Purchaser for IMI-Ward, advised Moore of Mosher that Mosher's invoices theretofore issued to IMI-Ward were not billed by sites and levels. Mosher then rebilled and sent new invoices to IMI-Ward, completing this task on January 19, 1962 (Finding of Fact No. 46, R. 1235). Thus on January 9 the Joint Venture had not yet accepted Mosher's invoices.

The only positive statement which was adduced from all these exhibits was to the effect that *on the date of the bankruptcy*, Union had "overpaid" the Joint Venture. Even

this was true only on *that particular date, and no other*, and it *does not appear* from any document or from any testimony that in the *final analysis*, after all the *change orders* and *impact and accelleration* attributable to the *Joint Venture* has been collected by Union, that Union will not owe money to the *Joint Venture*.

Here, as in many other parts of its brief, Union takes Mosher to task for *billing the Joint Venture* for its work rather than billing Union. Of course the whole purpose as explained to Mosher of the issuance of the *Joint Venture* purchase orders (Jt. 9 and 10) from the very inception on October 31, was for *convenience in billing* and the accounting and management of the *Joint Venture* work. (Another reason to wit, the profit in the work, has been discussed earlier in this brief). In answering the question specifically Mr. Moore made the following statement:

“Q. How is Graver to perform Page’s promise if you don’t send them invoices?”

“A. The whole purpose of transferring was for the convenience of billing. It never would have been transferred in the first place if it hadn’t been billed direct to IMI for their convenience. That was the way it was presented to us.” (R.T. 422)

In addition, the very procedures set up both by the Vernon John letter (Jt. 26) and the Feurt memorandum to Trytten (Jt. 24) *provided that the billing would go to the Joint Venture*, be approved, and *then forwarded* to Union for payment.

Finally, under Point II, Union cites in connection with contracts for the benefit of third parties the general proposition that, in the absence of reliance to its detriment, the rights of a third party beneficiary are subject to the equities between the parties. This, of course, does not apply where the beneficiary *has acted to his detriment* and, particularly

here, *where the beneficiary itself supplied the consideration for the contract*. The two cases cited by Union have no bearing upon this case because in the *Revell* case the agreement to pay the beneficiary *was contingent upon the agreement of Lidke to perform certain work*. The court found that Lidke “*did not do any part of the work which he agreed to do.*” Thus Morgan’s promise in its terms was conditional upon Lidke’s performance, which did not occur.

Likewise in the *Gallop* case it was held that where one Ernst who had rented a Hertz car under false pretenses and *in the name of another man* had injured the plaintiff, Hertz’s insurance carrier was not liable to the plaintiff because *Ernst was not a “customer”* of Hertz within the terms of the insurance contract between Hertz and the insurance carrier.

There is nothing whatever in the terms of the agreement between the Joint Venture and Union as set forth by the court in its Findings of Fact and as further expressed in Conclusion of Law No. 8, either from the agreement as expressed in the Vernon John letter and the Feurt memorandum, as understood by George Morton and the other parties thereto, or as expressed to Mr. Moore by Mr. Page, which under any circumstances could be interpreted as predicated Moshers’ rights to collect from Union on the existence of an indebtedness from Union to IMI-Ward. Indeed, there is not one shred of evidence to support Union’s contention in this regard.

RESPONSE TO POINT III

Summary of Argument

Moshers’ Proof of Claim, its Stipulation with IMI, the Bankruptcy Court’s Findings and its Judgment, all clearly stated and reserved Moshers’ claims against Ward, as *joint venturer* with IMI, and against Union, Fluor, and the sure-

ties. Mosher's position has not changed, and no discharge of Ward, Union, Fluor, or the sureties has occurred, either in fact or in law.

In Point III Union claims that Mosher is estopped from recovery by reason of having sought and received a distribution in the IMI Chapter XI proceedings. Union says this is so because Mosher claimed in the Chapter XI proceedings that the work performed pursuant to the purchase orders (Jt. Exs. 9 and 10) was an individual and independent liability of IMI, and, having received stock of the Debtor, in distribution in the Chapter XI proceedings, *cannot now change* its position and claim that the debt was also the obligation of Ward and Union.

Union takes this position *despite the fact* that the stipulated value of the distribution received by Mosher in the Chapter XI proceedings has been deducted from the judgment against Union entered by the court in this proceeding, and despite the fact that both Union and Ward also received valuable considerations in the Chapter XI proceedings.

To support its theory, Union cites the *Eads Hide and Wool Company* case. Union then says that Mosher, having been estopped as against Ward, by reason of the Chapter XI proceedings, Union as surety, is not liable to Mosher. The alleged facts stated by Union in this regard are so completely false and the *position of Mosher* in the IMI Chapter XI proceedings so *completely consistent with its position in this suit*, that Union's argument should be summarily dismissed.

Mosher's Proof of Claim in the Chapter XI proceedings (Union Ex. E) reads as follows: Paragraph 2. "That the above named Debtor was at and before the filing by him of

the petition herein, and still is, justly and truly indebted to the claimant corporation in the sum of Three Hundred Twenty-one Thousand Fifty-three and 54/100 Dollars (\$321,053.54), *except as qualified in Paragraph 10.*"

Paragraph 9 reads as follows: "This claim is filed as an unsecured claim, *except as qualified in Paragraph 10.*"

Paragraph 10, to which attention has been brought in both Paragraphs 2 and 9, reads as follows:

"Of the total debt hereinabove claimed by claimant corporation against the Debtor, the sum of Fifty-five Thousand Two Hundred Fifty-Three and 21/100 Dollars (\$55,253.21) is due and owing to the claimant corporation on account of materials fabricated and delivered to the job site at the Davis-Monthan Air Force Base, Arizona, after the filing by the Debtor of Debtor's petition herein and properly represented expenses of administration of this estate and should be accorded the priority provided by the Act.

"Claimant corporation claims that Ward Industries Corporation, *as joint venturer with the Debtor*, and Union Tank Car Company through its Division, Graver Tank & Mfg. Co., *are also liable* to claimant corporation *for the entire said debt*, but neither Ward Industries Corporation or Union Tank Car Company have admitted such liability, but on the other hand each has disputed the same and refused to pay the same. Claimant corporation's filing of the within claim in this proceeding is made *without prejudice to its rights against the said Ward Industries Corporation, and the said Union Tank Car Company* through its Division, Graver Tank & Mfg. Co., and claimant corporation retains and reiterates said claim against said companies.

"*In addition*, under the Miller Act, Title 40, Section 270a, et seq., of the U. S. Code, claimant corporation has claimed that *The Fluor Corporation, Ltd. and its sureties are liable* to claimant corporation *for that part of the debt relating to the Davis-Monthan Air Force*

Base job, but such claim has been refused and denied by the said The Fluor Corporation, Ltd. and its sureties, but claimant corporation claims its said claim under the said Miller Act and reiterates the same and files its claim herein without prejudice to its claim against The Fluor Corporation, Ltd. and its sureties under said statute."

Appellee does not believe that a more straightforward and comprehensive statement of Mosher's position could have been made, nor a more complete reservation of rights against Ward Industries Corporation, as joint venturer with the debtor, and Union Tank Car Company, The Fluor Corporation and sureties.

Thus Mosher *did not* in its Proof of Claim *elect* to pursue its claim *only* against IMI in the Chapter XI proceedings. Furthermore, if additional proof of Mosher's position be necessary, prior to the hearing and final award of certain shares of stock to Mosher in the IMI proceeding, the debtor and Mosher stipulated their respective positions, *specifically mentioning the cause number of the civil action in the United States District Court for the District of Arizona*, as follows:

"2. Mosher is entitled to an allowance of a general unsecured claim herein in the amount of \$265,800.33, subject to the conditions hereinafter set forth in this paragraph. The basis for said claim is as set forth in Mosher's Proof of Claim herein, which said claim is submitted herein *without prejudice to Mosher's rights against others whom it claims are also liable to it*. The parties hereto are in dispute respecting the manner in which I.M.I. stock should be distributed to Mosher pursuant to the Plan herein for Mosher's general unsecured claim. Mosher submits that the stock should be distributed to it direct; I.M.I. submits that the stock should be deposited in an escrow pending the final determination of the action instituted by Mosher against others in the District Court of the United States in the District of Arizona, which action is more fully described in Paragraph 7 hereof. The parties here-

to request that this Court determine the manner in which the I.M.I. stock is to be distributed to Mosher."

"7. Mosher takes and has taken the position that *Union Tank Car Company* and *Ward Industries Corporation*, along with *I.M.I.* and the *Fluor Corporation* on its *Miller Act bond*, are liable to Mosher for said \$55,253.21 *as well as other amounts*. Mosher has filed an action against *Union Tank Car Company*, *Ward Industries Corporation*, the *Fluor Corporation*, and certain insurance companies to attempt to establish the liability of said defendants to Mosher for said amount, *as well as other amounts*. Said defendants contest the assertions of Mosher and said litigation is now pending before the District Court of the United States for the District of Arizona, *being Civil Action No. 1605.*" (Union Ex. QQQ; Pl. 26).

Finally, after a hearing with due notice, the Referee in Bankruptcy, in determining whether Mosher should be entitled to receive stock of the reorganized debtor immediately, or whether said stock, as the debtor contended, should be held in escrow pending final determination in the District Court in Arizona, expressed the following opinion:

"With regard to the second issue, the Court is of the opinion that there is no appropriate reason to delay the delivery of the shares to be issued to Mosher Steel Company pursuant to the Plan of Agreement. As its counsel has pointed out, the value of the stock which Mosher Steel Company will receive as a result of this proceeding will doubtless have to be deducted from the amount of its claim against *Union Tank Car Company* and the other parties in the Arizona litigation. This claimant is entitled to the same treatment as other creditors of the Debtor with respect to the delivery of the shares. It does not appear likely that delivery of the shares to Mosher Steel Company at this time could result in a double payment." (Pl. 30).

and in the Order itself stated:

"That the objections to the immediate delivery to Mosher Steel Company of certificates representing

shares of the capital stock of the Debtor in settlement of the said claim pursuant to the Plan of Arrangement are hereby overruled, and the request that said certificates be ordered deposited in escrow pending final determination of *the action now pending before the District Court of the United States for the District of Arizona and instituted by Mosher Steel Company against Union Tank Car Company, Ward Industries Corporation, Fluor Corporation, and others*, is hereby denied." (Pl. 30).

Under these circumstances, how can it be said that Mosher's position in the case at hand and its position in the Chapter XI proceedings were in any way different?

It is fundamental in the Bankruptcy Act that persons having claims against the debtor and others may, and they are encouraged to, file claims in the bankruptcy proceedings.

The liability of a Co-Debtor or Guarantor, or in any manner a Surety for a Bankrupt, is not altered by the discharge of such bankrupt.

"Section 16. Co-Debtors of Bankrupts. The liability of a person who is a co-debtor with or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." (U.S.C., Title 11, Chap. 3, Sec. 34)

Section 16 is applicable to Chapter XI Proceedings.

"Section 302. The provisions of Chapters I to VII, inclusive, of this act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter * * *" (U.S.C., Title 11, Chap. 11, Sec. 702).

Cite further *Collier on Bankruptcy*, paragraph 9.32 (11), Vol. 9:

"Co-Debtors with or Sureties for Debtor.

Whereas an ordinary composition of a principal's debt outside of bankruptcy, resting as it does in contract, is generally held to release the surety, the re-

lease of a principal's debt which results from confirmation of an arrangement does not discharge the surety. That result with respect to co-debtors with or sureties for the debtor is expressly provided for in Section 16 of the Act, which is applicable to Chapter XI proceedings.

The contention is made by Union that since IMI and Ward were partners, that the Trustee in Bankruptcy or, in this case, the debtor in possession should have kept a separate set of claims for those claiming the liability of IMI individually and those claiming the indebtedness of IMI as a member of the joint venture with Ward. This is said to be required under a partnership provision of the Bankruptcy Act (Sec. 5-G).

Of course a joint venture does not necessarily create the same legal relationship as does a partnership. See *Ruby v. United Sugar Companies, S.A.*, 109 P. 2d 845, 56 Ariz. 535, and *Mariani v. Summers*, 52 N.Y.S. 2d 750, affirmed 56 N.Y.S. 2d 537. For example, in New York under the partnership law the partners are liable jointly for all debts other than those involving misapplication of money or property, or tort. Under the Joint Venture Agreement executed by IMI-Ward, IMI-Ward agreed that their obligations under the Joint Venture Agreement would be *joint* and *several*. (See quotations from the Joint Venture Agreement in Appellee's brief in response to Ward)

In addition the Bankruptcy Act provisions relating to the keeping of separate books as to partnership and individual liabilities, and the preferred position of individual creditors against individual assets and partnership creditors against and the arrangement, when finally confirmed, awarded stock in the reorganized corporation.

There is nothing in the record to indicate whether or *not* any separate accounting was kept as between individual and joint venture creditors, nor is there anything in the record

to support the proposition that Mosher benefited at the expense of other creditors in receiving the stock distributed to it. The Bankruptcy Court must be presumed to have discharged its duties properly. Union's position here in reality constitutes a collateral attack upon the judgment of the Chapter XI Court.

Union and Ward, of course, were awarded the status of general creditors of IMI in the Chapter XI proceedings. Union, in fact, received forty percent of all the stock issued upon confirmation of the arrangement. (Pl. 30).

The case which is applicable to the facts herein is *Bridgeport-City Trust Co. v. Niles-Bement-Pond Co.*, 128 Conn. 4, 20 A (2d) 91. The creditor filed its claim against the debtor in a reorganization proceeding and further stated that the claim was filed without prejudice to its rights against the defendant to recover the amount of loans secured by them.

The court, as against a claim by the defendant of bar because of change of position stated "The statement in the claim filed by the plaintiff was a sufficient reservation of its right to enforce the security it held despite the filing of that claim."

RESPONSE TO POINT IV

Summary of Argument

In its final Point, Union takes the Trial Court to task for failure to determine the issue whether Union was a surety for the Joint Venture. The claim or suretyship by Union was brought by way of counterclaim against Mosher (R. 295) rather than against Ward, but the court declined to dismiss the counterclaim, and Mosher answered paragraph 1 of Union's Counterclaim, which had alleged that Mosher had sued Union as surety, in the following language: "1. Plaintiff herein admits the allegations of paragraph 1, and further alleges that the Amended Complaint includes *other counts and allegations* as therein set forth." (R. 617)

Thus Mosher, in answering the Counterclaim, admitted that one of the grounds of its Amended Complaint alleged a cause of action against Union as guarantor, and reiterated that other grounds of its Amended Complaint had alleged that Union's obligation to Mosher was a primary and direct obligation.

The overwhelming preponderance of the credible testimony and the evidence, has now caused the Trial Court to hold that Union's obligation to Mosher was direct rather than collateral, and for this reason the court rendered judgment that the defendant Union Tank Car Company take nothing by its Counterclaim.

Having entered Findings of Fact and Conclusions of Law finding and concluding a direct obligation to Mosher on Union's behalf, it would appear that additional findings and conclusions based upon the Counterclaim were unnecessary, and we feel sure that this court will agree that the Findings of Fact and Conclusions fully cover the subject matter of the Counterclaim.

CONCLUSION

For the reasons set forth in this brief, Appellee Mosher Steel Company respectfully prays that the judgment entered on May 4, 1966 by the United States District Court for the District of Arizona, sitting at Tucson, Arizona, be affirmed as to Appellant Union Tank Car Company (save for the denial of pre-judgment interest), and Appellee further prays that it be awarded its costs of suit.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in dark ink, reading "Frank H. Watkins", written over a horizontal dashed line.

Frank H. Watkins, *Attorney*

United States Court of Appeals

FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD., *et al.*,
UNION TANK CAR COMPANY,
WARD INDUSTRIES CORPORATION,

*Appellants,
Cross-appellees,*

—v.—

U. S. A., Ex REL MOSHER STEEL COMPANY,

*Appellee,
Cross-appellants.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF ARIZONA

BRIEF OF CROSS-APPELLEE, WARD INDUSTRIES CORPORATION

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FILED

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United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21307, No. 21307A, No. 21307B, No. 21307C

FLUOR CORPORATION, LTD., *et al.*,
UNION TANK CAR COMPANY,
WARD INDUSTRIES CORPORATION,

*Appellants,
Cross-appellees,*

—v.—

U. S. A., EX REL MOSHER STEEL COMPANY,

*Appellee,
Cross-appellants.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF ARIZONA

BRIEF OF CROSS-APPELLEE, WARD INDUSTRIES CORPORATION

The plaintiffs and cross-appellants, UNITED STATES OF AMERICA for the use of Mosher Steel Company and Mosher Steel Company ("Mosher"), cross-appeal from so much of the final judgment in their favor for the sum of \$268,882.92, dated and entered May 24, 1967, against the defendants Union Tank Car Company ("Union") and Ward Industries Corporation ("Ward"), and for the sum of \$246,165.96 against the defendants Fluor Corporation, Ltd. ("Fluor"), Federal Insurance Company, Vigilant Insurance Company, Insurance Company of North America, General Insurance Company of America, Seaboard Insurance Company, American Reinsurance Company, Employees' Re-Insurance

Group and General Re-Insurance Group ("the sureties"), which failed to award pre-judgment interest to the plaintiff.

Mosher's present cross-appeal was filed after Ward appealed to this Court from the judgment against it, seeking a reversal thereof and a dismissal of Mosher's causes of action against Ward upon the merits. If Ward's appeal is successful, then, as to it, Mosher's claim for pre-judgment interest, which is the subject matter of Mosher's cross-appeal, will become academic and moot. Nothing contained in this brief by Ward should be deemed or construed to constitute an admission, direct or indirect, express or implied, that there is any merit, substance or justification for the judgment entered by the District Court in favor of Mosher against Ward.

Jurisdictional Statement

Jurisdiction of the cross-appeal is claimed to exist pursuant to Sections 1291 and 2107, Title 28, U.S.C.

The Nature of the Case

The plaintiffs and cross-appellants, United States of America for the use of Mosher Steel Company and Mosher Steel Company, brought this action in the United States District Court for the District of Arizona: (1) against the defendants Union, Fluor, the sureties and Ward for the sum of \$298,336.58, which it claimed was due and owing to it for the fabrication and delivery to Union of certain steel owned by Union and incorporated by Union in the Titan II Missile Launch Facilities near Tucson, Arizona (the Tucson project), and the freight charges relating thereto; and (2) against the defendants Union and Ward

for the sum of \$22,716.96, which Mosher claimed was due and owing to it for the fabrication and delivery of steel owned by Union and incorporated by Union in the Missile Launch Facilities at the Vandenberg Air Force Base, Vandenberg, California (the Vandenberg project), and the freight charges relating thereto. The total amount sought by Mosher was the sum of \$321,053.54.

On February 2, 1962, prior to the commencement of this action, IMI filed a voluntary petition under Chapter XI of the Bankruptcy Act in the United States District Court, Southern District of California, Central Division. On July 5, 1962, Mosher filed a proof of claim in the IMI Chapter XI proceedings, wherein it alleged that IMI was indebted to Mosher for the steel fabricated and delivered to the Tucson project in the amount of \$298,336.58, and for the steel fabricated and delivered to the Vandenberg project in the amount of \$22,716.96 (R 1236).

On December 31, 1963, pursuant to a plan of arrangement and in satisfaction of Mosher's claim against IMI, the Referee in Bankruptcy in the IMI Chapter XI proceeding ordered the issuance to Mosher of 642,107 shares of IMI stock. Subsequent to the date of that order, but prior to the actual issuance of the stock, IMI changed its name to Allied Equities Corporation and declared a one to twenty "reverse" split (R 1237). As a result of these proceedings, Mosher actually received 32,105 shares of Allied Equities stock as a payment upon its open book account. That payment obviously diminished the amount of Mosher's claim against Union and/or Ward arising out of the transactions which are the subject matter of this lawsuit.

Since the distribution to Mosher from the IMI bankruptcy proceeding took the form of stock rather than cash, a serious issue arose during the trial below as to the value, in dollars, of the 32,105 shares of Allied Equities stock re-

ceived by Mosher and the amount, in dollars, by which Mosher had been paid.¹ That issue, raised by Ward's answer (R 330), was only resolved when the parties, at the close of the plaintiff's case, stipulated upon the record that the shares of Allied Equities stock received by Mosher possessed a value of \$1.625 per share, and that the total dollar value of the stock so received was the sum of \$52,170.62 (R 1237).

It is thus apparent that the amount of Mosher's claim could not possibly be ascertained until the value of the Allied Equities stock was determined. Until the value of that stock was determined, Mosher's claim was unliquidated. Since Mosher's claim was unliquidated, the Court below was correct in denying Mosher's motion for pre-judgment interest.

The Sole Issue Presented by This Cross-Appeal

The sole issue presented by this cross-appeal is whether, if the judgment of the Court below be affirmed as to Ward, the plaintiff is entitled to interest at the rate of 6% per annum from March 31, 1962 until May 24, 1966, the date when the District Court's judgment was entered in its favor.

In Finding of Fact No. 53, the Court below found as follows (R 1237):

"53. On December 31, 1963, the Referee, pursuant to a plan of arrangement, ordered issued to Mosher in

¹ The inordinate difficulties of determining the monetary value of the stock of a company newly emerged from the bankruptcy court is reflected by the classic discussion contained in Bonbright, "Valuation of Property", Volume 1, Part 1, pp. 3-65. It is likewise demonstrated by the fact that, within sixteen months after the conclusion of the trial herein, the stock of Allied Equities was quoted at prices ranging from \$12³/₈ to \$12⁷/₈ per share (R. pp. 1337-1338).

settlement of its claim against the debtor, IMI, certificates for 642,107 shares of IMI stock (Union Ex. D in evidence). Thereafter, IMI changed its name to Allied Equities Corporation and the stock was actually issued in a 1 to 20 'reverse split' (Jt. Ex. 39 in evidence), whereby Mosher received 32,105 shares of Allied Equities Corporation stock, the value of which has been established by stipulation of all parties to this action at \$1.625 per share, or a total of \$52,170.62 (RT 682).

* * *

Based upon Finding No. 53, the Court thereupon concluded (Conclusion of Law, No. 15; R 1240):

"Inasmuch as Mosher's claims against all parties are unliquidated, until judgment is entered no interest is recoverable prior to the entry of judgment herein."

In view of the above, the Court below properly held that the dollar value of the Allied Equities stock which Mosher had received from IMI pursuant to the IMI plan of reorganization, as a payment upon its open account, was unascertainable until it was stipulated by the parties at the trial. The amount of Mosher's claim was therefore unliquidated, since it could not possibly have been determined prior to the trial by any method of computation or calculation.

ARGUMENT

POINT I

The Court below correctly found that the amount allegedly due to Mosher was unliquidated until the value of the IMI stock received by Mosher was determined by the Court. Mosher was therefore not entitled to pre-judgment interest upon the amount ultimately found to be due.

The dollar value of the IMI stock, as has been noted, was only ascertained by the Court at the trial as a result of a stipulation between the parties resolving that issue. Until it was so resolved, the amount of Mosher's claim against Union and/or Ward could not possibly be determined. Since it was neither fixed, certain nor ascertainable by calculation, it necessarily constituted an unliquidated claim.

It has been uniformly held by the Federal Courts that the law of the forum State applies to a determination of whether pre-judgment interest may be allowed upon a judgment rendered by the Federal Court sitting in such state. See, for example, *Pacific State Steel Corporation v. Isaacson Iron Works*, 320 F. 2d 624 (9 CA, 1963), which applied California law. While the Courts of Arizona have not passed upon the issue presented by the case at bar, it was held, in *Schwartz v. Schwerin*, 85 Ariz. 242, 336 P. (2d) 144 (Supreme Court, Arizona, 1959), that no interest may be allowed upon a judgment rendered upon an unliquidated claim.

In *Pacific State Steel Corporation v. Isaacson Iron Works*, *supra*, a case remarkably akin to the instant action, this Court ruled as follows in disallowing a claim for interest in a judgment based upon an open book account:

“* * * The trial judge relied upon 1 Cal. Jur. 2—
 ‘Accounts and Accounting,’ sec. 40, p. 363:

‘With respect to the allowance of interest, accounts ordinarily draw interest only from the day on which they are settled and a balance is ascertained. The provision of the Civil Code [note] that every person who is entitled to recover damages that are certain or capable of being made certain by calculation, the right to which is vested in him upon a particular date, may also recover interest thereon from that date, has no application to actions to recover upon an open book or mutual account that was never settled or balanced, or to the items of the account as they become due, even though the claim be for goods sold and delivered.’ * * *”

None of the authorities cited by Mosher in its brief as “persuasive” (Mosher Br., p. 11) are applicable to the facts at bar. *Macri and Sons, Inc. v. U. S. A. for the use of Oaks*, 313 F. 2d 119 (9 CA), dealt with an *unliquidated counterclaim* interposed to an *indebtedness admittedly due*. *American Surety Co. of N. Y. v. U. S. A. for the use of B & B Drilling Co.*, 368 F. 2d 475 (9 CA) dealt with an *unliquidated set-off* to a claim which was certain and fixed.

In the instant case, Mosher’s recovery in the IMI bankruptcy proceedings of 32,105 shares of Allied Equities stock in satisfaction of its claim was not, and could not possibly have been, the subject matter of a counterclaim or set-off by Ward. They were not property in which Ward possessed any proprietary interest whatsoever. Mosher’s receipt of those shares constituted, precisely as Ward alleged as an affirmative defense in its answer (R., 330), a *payment* by IMI upon an existing open account which diminished the amount of that account by the dollar value of the payment when that dollar value was finally ascertained. Until the

dollar value of the payment was judicially fixed by the final judgment entered herein, the amount of the claim itself was obviously unknown, indeterminate and unliquidated.

CONCLUSION

For all of the reasons hereinabove set forth, it is respectfully submitted that the Court below properly refused to grant pre-judgment interest.

Respectfully submitted,

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and

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Certificate of Compliance

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH LOTTERMAN
Attorney

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WM. B. LUCK, CLERK

No. 21307

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FILED

FLUOR CORPORATION, LTD.,
ET AL
UNION TANK CAR COMPANY
DRAGOR SHIPPING CORPORA-
TION, a corporation,
formerly Ward Industries
Corporation,

Appellants
Cross Appellees

vs.

U.S.A., EX REL MOSHER STEEL
COMPANY,

Appellee
Cross Appellants

DEC 7 1967

WM. B. LUCK, CLERK

No. 21307
No. 21307 A
No. 21307 B
No. 21307 C

**JOINT ANSWERING BRIEF OF
CROSS APPELLEES**

**UNION TANK CAR COMPANY, FLUOR CORPORATION,
LTD., AND THE SURETIES**

Upon Appeal from the District Court of the United
States, for the District of Arizona

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No. 21307
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAROLD C. WARNOCK
FLUOR CORPORATION, LTD.,
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UNION TANK CAR COMPANY
DRAGOR SHIPPING CORPORA-
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vs.

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No. 21307
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JOINT ANSWERING BRIEF OF
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UNION TANK CAR COMPANY, FLUOR CORPORATION,
LTD., AND THE SURETIES

Upon Appeal from the District Court of the United
States, for the District of Arizona

JURISDICTIONAL STATEMENT

The jurisdiction of this Court to entertain this cross appeal has been invoked pursuant to Sections 1291 and 2107 of Title 28, U.S.C. The jurisdiction of the District Court was invoked pursuant to Sections 270(a) and (b) of Title 40, U.S.C., commonly known as the Miller Act, as to Count I of the Amended Complaint, and Section 1332, Title 28, U.S.C., as to Counts II

through VII of the Amended Complaint (R. 268). The District Court, in its Conclusion of Law No. 1 (R. 6, p. 1237), held that jurisdiction existed with respect to all claims asserted by plaintiff against the defendants.

STATEMENT OF THE CASE

Inasmuch as the legal question presented by this cross appeal is practically identical with respect to Union Tank Car Company, and Fluor Corporation and the Sureties, these cross appellants are filing a joint answering brief on this issue.

The sole question presented is whether, in the event the judgment below is not reversed, Mosher Steel Company is entitled to recover statutory interest from the March 28, 1962 date on which plaintiff's alleged claims purportedly became due rather than from the May 24, 1966 date on which judgment was entered below. The parties herein have presented full and complete statements of the case in their main briefs. In order to avoid burdensome repetition, only those facts particularly pertinent to the limited cross appeal issue are set out below.

This action was filed by the use plaintiff, Mosher Steel Company, on January 23, 1963 to recover the sum of \$321,053.54 (R. 1680). Of this amount \$298,336.58 was sought from defendants Ward Industries Corporation, Union Tank Car Company, and Fluor Corporation, Ltd. and its sureties, for furnishing, fabricating and delivering steel used in the Titan II, Phase II, Missile site work at Davis-Monthan Air Force Base, Tucson, Arizona, and \$22,716.96 was sought from defendants Union and Ward for furnishing, fabricating and delivering steel used in the similar work at Vandenberg Air Force Base, Lompoc, California. Judgment was ultimately entered on May 24, 1966 against defend-

ants Ward and Union in the amount of \$268,882.92 and against defendant Fluor and its sureties in the amount of \$246,165.96 (R. 1240).

Plaintiff's seven-count amended complaint (R. 268-80) alleged four alternative theories of recovery against Union: (1) That Union requested Mosher to perform the subject work for the IMI-Ward joint venture and had agreed to pay for the same upon completion thereof (Counts II and IV, R. 271, 275); (2) That Union had orally promised to guarantee the account of IMI-Ward with the intention of not honoring its promise in order to induce Mosher to accept purchase orders from the joint venture (Count V, R. 275); (3) That Union and IMI-Ward had entered into a third party beneficiary agreement for the benefit of Mosher whereby Union agreed to pay Mosher and IMI-Ward agreed that such payment would be deducted from funds coming due to the joint venture (Count VI, R. 277); and (4) That under a February 5 agreement approved by the court in the IMI bankruptcy, Union undertook to pay Mosher for fabricated steel deliveries made after IMI's institution of bankruptcy proceedings (Count VII, R. 278).

Union's answer to the amended complaint denied that any of the alleged agreements or promises had been made and further denied that all or any of the amounts claimed was due and owing the plaintiff (R. 1095). As further defenses, Union pleaded (1) that any alleged guaranty contract was invalid by reason of the statute of frauds (R. 1099); (2) that any alleged third party beneficiary contract was rendered unenforceable because of the joint venture's default and for want of funds due the joint venture out of which to pay plaintiff (R. 1101-2); and (3) that plaintiff was estopped to assert a claim against Union by reason of having elected in the bankruptcy court to treat the indebtedness

in question as the primary and individual responsibility of IMI (R. 1098-9). Substantial defenses were also presented in the answers filed by Union's co-defendants Fluor Corporation, Ltd. and Ward Industries Corporation.

The case was tried to the court without a jury, commencing November 18, 1964 and ending December 4, 1964. During the course of the trial Mosher was unable to establish the dollar amount of its claim because it had no substantial evidence of the value of the IMI stock distributed during the California bankruptcy proceedings, the value of which stock constituted a credit and reduction in the amount of its claim. In this regard the court advised plaintiff's counsel (R. 449):

"It appears in the record the plaintiff has received something on the transaction that gives rise to its claim and certainly there would be a credit on it. As to what the credit would be that is a matter of your proof. If counsel can stipulate on something, fine, but otherwise I think, you will have to show the proper credit."

The court thereupon gave plaintiff an opportunity to postpone the closing of its case in order to secure the necessary evidence. Later plaintiff's counsel advised the court (R. 681), "Your Honor, we have been unable to find any probative evidence on the subject." This deficiency in proof was only obviated when counsel for defendants agreed to stipulate as to the value of the stock distributed "in order to come to an expeditious conclusion" of the case (R. 682).

On May 24, 1966, eighteen months after the trial, the court below entered findings of fact and conclusions of law holding all defendants liable to Mosher (R. 1220-40). However, the trial court denied an allowance of

prejudgment interest on any of the claims asserted against defendants, holding as its Conclusion of Law No. 15 (R. 1240):

“Inasmuch as Mosher’s claims against all parties are unliquidated until judgment is entered, no interest is recoverable prior to entry of the judgment herein.”

Mosher thereupon moved to amend the court’s findings and conclusions so as to provide for the allowance of prejudgment interest commencing from March 28, 1962 (R. 1266). It is from the denial of that motion and the judgment denying the additional interest sought that Mosher has taken this cross appeal.

SPECIFICATION OF ALLEGED ERROR

Whether the District Court erred in denying recovery of prejudgment interest on the ground that Mosher’s claims against defendants were unliquidated where the record establishes that both the validity and the amount of the claims were at all times in substantial dispute.

ARGUMENT

SOLE POINT

The District Court, in its Conclusion No. 15, did not err in refusing to allow prejudgment interest.

In urging this Court to amend or modify the District Court’s judgment insofar as it relates to the date from which interest should be computed, Mosher belabors the familiar rule that liquidated claims bear interest from the date they become due. This indulgence in question begging affords no help in determining whether that rule is applicable under the facts and circumstances of this case.

These appellants have no quarrel with Mosher's assertion that prejudgment interest in this action is allowable only to the extent provided by the law of Arizona. Nor does Union dispute that the general rule in Arizona is as set forth in *United States Fidelity & Guaranty Co. v. California-Arizona Co.*, 21 Ariz. 172, 186 P. 502 (1920), that if the claim is liquidated "interest should be computed from the time the debt became due." However, under Arizona law a claim is not deemed liquidated unless liability is definitely fixed, and the amount thereof is established by mere computation rather than evidence. By definition, no such claim was asserted in the present case where the validity and amount at all times have been controverted and in dispute. *U.S.F. & G. Co., supra*.

Appellee first sought to bring the question of interest before the court after judgment, when it filed (R. 1266) a Motion requesting the court to make an additional finding that the plaintiff's charges were liquidated, and to amend Conclusion No. 15 which provided, that Mosher's claim against all parties were unliquidated. In the memorandum accompanying the motion, appellee conceded that the allowance of prejudgment interest in the Federal Courts is governed by the law of the State where the contract is to be performed (R. 1269).

The motion was denied by the court.

That Mosher's claims were not "liquidated" is demonstrated by the Arizona Supreme Court decision in *U.S.F. & G.*, which is so strikingly similar to the instant case as in our opinion to be dispositive of this cross appeal. There the defendant, in connection with a contract to improve city streets, executed two surety bonds: one for faithful performance of the contract, and another for payment of materials furnished and work done by

materialmen and subcontractors. After completion of the improvements but before all subcontractors were paid, the general contractor was adjudged bankrupt. Warren Brothers, one of the subcontractors, filed suit against the surety and recovered on its claim for "services of an inspector who performed certain duties with respect to the improvement" and for royalties for use of "a patented material for laying . . . paving." With respect to the latter portion of the claim, a substantial dispute existed whether royalties were to be computed on the basis of 25¢ or 20¢ per square yard of paving. This matter was only resolved through a trial stipulation which fixed the rate employed in determining the amount of the judgment.

On its appeal the surety assigned two errors, the first being that the trial court erred in allowing the claim for royalties on the theory that a royalty is neither labor nor material as contemplated by the bond, and the second being that the court erred in allowing interest on the claims from the date of their filing with the municipality (i.e., the date they became due), on the theory that they were "not capable of definite ascertainment as to validity or amount until the rendition of judgment."

The court held against the surety company on the first assignment of error, ruling that royalty charges fall within the purport of the bond, but held for the surety company on the second assignment by reversing the trial court's holding that interest be imposed from the date the debt allegedly became due. In arriving at the latter determination the court said:

"The adjudicated cases present a bewildering variety of rulings with respect to the time from which interest should be computed. The statutes of this state regulate only the rate of interest and

are silent as to the time from which it is to be allowed. Both the validity and the amount of the claims in this case were disputed by the surety company. It is apparent, therefore, that this is not a case where the amount of recovery, if recovery be had, was definitely fixed by agreement of the parties or capable of ascertainment by mere computation. * * * In cases of this character the better rule seems to be that interest is to be computed from the time of the commencement of the action, and we think that rule should be applied in this case.”*

In the instant case, as in the *U.S.F. & G.* case, both the validity and the amount of the claim were very much in dispute and in both cases the extent of the latter, if recovery was to be had, was determined by stipulation during the trial. With respect to validity, aside from the defenses pleaded at the trial and referred to above, no court could determine whether or not Mosher's claim had been satisfied in the IMI bankruptcy proceedings until the value of certain stock received by Mosher was determined. Mosher admitted on the record that this value was not subject to proof.

Accordingly this case does not present a situation where the validity of the claim is not seriously disputed, as in *Weston & Brooker Co. v. Continental Casualty Co.*, 303 F. 2d 91 (C.A.4, 1962), cited by cross appellant. In that case defendant by “sworn answers to interrogatories admitted the indebtedness” and “convinced the [trial] court that [it] was engaged in dilatory tactics

* The court allowed interest from the date on which suit was filed on the theory that such date controlled when the claim in question was unliquidated in nature. This rule was subsequently modified in *Schwartz v. Schwerin*, 85 Ariz. 242, 250, 336 P. 2d 144 (1959), so that interest on an unliquidated claim now runs in Arizona only from the date on which judgment is rendered rather than from the date of filing suit. This is in accordance with the prevailing rule in most jurisdictions. *Schwartz* reviews all Arizona decision on the point.

and that it had no valid defense to plaintiff's claim (p. 92). In approving the trial court's imposition of interest from the date the debt became due, the court noted, ". . . that defendant was but delaying the inevitable" and ". . . was not energetically seeking to throw light on the facts at issue" (p. 93).

With respect to the amount of the claim, the record demonstrates that the amount in question was anything but liquidated. Mosher conceded that its claim was uncertain by its pleadings. It originally filed suit against Union, et al. on January 23, 1963 to recover the sum of \$298,336.58 (R. 2). On June 5, 1964 it amended its complaint (R. 268) to claim \$321,053.54 allegedly owed for fabricating steel on both the Tucson and Vandenberg jobs (R. 1680) (U. Ex. D).

Furthermore, on December 31, 1962 the referee in bankruptcy, pursuant to a plan of arrangement, ordered issued to Mosher as a general unsecured creditor 642,107 shares of IMI stock (U. Ex. E). IMI thereafter changed its name to Allied Equities Corporation and issued the stock in a 1 for 20 "reverse split" whereby Mosher received 32,105 shares (R. 1237). However, the value of these shares (\$52,170.62) was not established until December 1, 1964, when the defendants stipulated a value because Mosher conceded it had no probative evidence (R.T. 681, 682). This was nearly two years after the commencement of this litigation and nearly three years after the date of the amount was allegedly due. In this respect the fact situation in the present case is once again virtually identical with that in *U.S.F. & G.*, where the amount of plaintiff's claim could not be computed without a trial stipulation concerning the rate to be paid for paving.

Mosher was content to let the case go to judgment

without the matter of the credit for IMI stock being taken into consideration. Its pre-trial memorandum (R. 228) states:

“The Plaintiff’s position is that the court should adjudicate which party in this action shall be given credit for the value of said stock, if and when said stock is received by Plaintiff.”

At the trial the following transpired (Tr. 681):

“MR. PURNELL: One final thing, Your Honor, before plaintiff rests. The matter of the stock or value of the stock. Does the Court deem that that is a part of the plaintiff’s case at this time or does the Court agree with the plaintiff’s position in its pre-trial memorandum that that value should be determined at a later time?”

THE COURT: I believe if you are to offer evidence as to the value, now is the time.

MR. PURNELL: Now is the time to do it. Your Honor, we have been unable to find any probative evidence on the subject. The defendants have offered to stipulate that the shares are worth one dollar and five-eighths ---

MR. LOTTERMAN: You say the defendants have offered to stipulate?

MR. PURNELL: I beg your pardon, Mr. Warnock.

MR. LOTTERMAN: This is the first I have heard of it.

MR. PURNELL: Mr. Warnock and Mr. McConnell. We don’t think that the plaintiff could, actually ever could and certainly cannot now obtain that much money for it, but under the circumstances, the nature of the matter is such we feel that all of the doubt should be resolved in favor of the defendants on this score

and we are prepared to stipulate that the shares were worth a dollar and five-eighths at the time they were received.”

Mosher’s reliance on *Sam Macri & Sons, Inc. v. United States of America*, 313 F. 2d 119 (C.A.9, 1963) and *American Surety Co. of New York v. United States*, 368 F. 2d 475 (C.A.9, 1965) is misplaced because those cases involved Alaska and Nevada law and concerned only the rule applicable where setoffs or counterclaims are raised as a defense to *admittedly liquidated* claims for relief. They have no application in the present case where the claims of the plaintiff have been in dispute on both the issue of validity and of amount.

CONCLUSION

We respectfully submit that the *U.S.F. & G.* and *Schwartz* cases fully establish that the trial court did not err in refusing to allow prejudgment interest in this action. Accordingly, the District Court's judgment, insofar as it relates to this limited cross appeal issue, should be affirmed.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HAROLD C. WARNOCK
Of Counsel

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

THE FLUOR CORPORATION,
LTD., et al,
UNION TANK CAR COMPANY,
WARD INDUSTRIES CORPORATION,
now known as DRAGOR
SHIPPING CORPORATION,

*Appellants,
Cross-Appellees,*

vs.

U. S. A. ex rel MOSHER STEEL
COMPANY,

*Appellee,
Cross-Appellant.*

No. 21307
No. 21307A
No. 21307B
No. 21307C

REPLY BRIEF OF APPELLANTS

THE FLUOR CORPORATION, LTD., FEDERAL
INSURANCE COMPANY, VIGILANT INSURANCE
COMPANY, INSURANCE COMPANY OF NORTH
AMERICA, GENERAL INSURANCE COMPANY OF
AMERICA, SEABOARD SURETY COMPANY,
AMERICAN RE-INSURANCE COMPANY, EMPLOY-
ERS REINSURANCE CORPORATION and GEN-
ERAL REINSURANCE CORPORATION

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**IN THE
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WARD INDUSTRIES CORPORATION,
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vs.

U. S. A. ex rel MOSHER STEEL
COMPANY,

*Appellee,
Cross-Appellant.*

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No. 21307A
No. 21307B
No. 21307C**

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The opening brief of Fluor and the Sureties asserted that the Miller Act, pursuant to which judgment was rendered against these appellants, was intended only to protect persons having contractual relationships with a subcontractor on government work *as a materialman, laborer or subcontractor.*

We further asserted that the obligation of Union "to pay Mosher directly" found by the court (Conclusion of Law No. 6, A.R. 1238) was not the type of "direct contractual relationship" contemplated by the Miller Act. (40 U.S.C. 270b)

Finally, we asserted:

"Exhaustive research has failed to produce a single case in which a court has held that a claimant, too remote in the chain of subcontracts to come under the protection of the Miller Act is entitled to recover against the prime contractor and its sureties because it had received a promise from the subcontractor that it would be paid."

Mosher does not quarrel with any of these assertions. Instead it now for the first time claims to be a materialman or subcontractor to Union (p.3):

". . . Mosher was concededly a laborer and materialman directly for Union under the Joint Venture purchase orders, and since Union was directly obligated to Mosher for the payment thereof, the contractual relationship between Mosher and Union was in fact 'as a materialman, laborer, or subcontractor.'"

An examination of the joint venture purchase orders (Jt.Ex. 9 and 10) and of the trial court's findings of fact and conclusions of law (A.R. 1220) show that this position is completely untenable.

Joint Exhibits 9 and 10 are the usual form of purchase order. They are dated 11/3/61 and signed by Mr. Wright, the purchasing agent for IMI-Ward, a joint venture, on Idaho-Maryland Industries printed forms, because at that time IMI-Ward had not yet acquired a supply. (Finding of Fact No. 30, A.R. 1229) Union was not a party.

Mosher does not give any transcript or record reference to support its statement that it was a "materialman, laborer, or sub-contractor." It did not propose a Finding (A.R. 1384) or a Conclusion (A.R. 1406) to this effect, and the findings and conclusions entered by the court lend Mosher no support. On the contrary, it is clear that Conclusions No. 4 and No. 6 (A.R. 1238) that the court considered Mosher to be a materialman or subcontractor to *IMI-Ward* and predicated IMI-Ward's liability on the terms of the purchase orders, but based the liability of Union on "Page's telephone conversation with Moore on November 19, 1961, and his telegram to Moore of the same date . . ."

Since Mosher now concedes that the validity of its judgment against these appellants depends upon an express or implied finding by the court that it is a materialman or subcontractor to Union, and the facts are to the contrary, it is clear that the judgment against these appellants under the Miller Act cannot stand. As we pointed out, our research has disclosed not a single case granting relief under the Miller Act to a litigant in Mosher's position, and Mosher has produced a brief with no citations of authority whatsoever.

Mosher dismisses as "poppycock" the statement in our brief that there was no conceivable way in which Fluor could protect itself in the fact situation presented by this case, and goes outside of the record to hint that there were change orders and other claims out of which Fluor could have withheld sums due Graver, carefully refraining from stating that such claims were paid and not elaborating on the legal consequences to Fluor of such an act. The suggestion is that Fluor should have engaged in litigation with Graver to protect Mosher from the consequences of its incompetent handling of this transaction. It should be remembered that Mosher ad-

mittedly never, at any time, sent its invoices to Graver (TR 453).

The Supreme Court has suggested no such duty on a prime contractor. In *MacEvoy v. U.S.* (1944), 322 U.S. 102, 64 S. Ct. 890, 88 L. Ed. 1163, the court made it clear that a prime contractor is entitled to know, in sufficient time to protect himself by bond or otherwise, of the existence of a person claiming to be a materialman or subcontractor.

The court said:

“The relatively few subcontractors who perform part of the original contract represent in a sense the prime contractor and are well known to him. It is easy for the prime contractor to secure himself against loss by requiring the subcontractors to give security by bond, or otherwise, for the payment of those who contract directly with the subcontractors. United States use of *Hill v. American Surety Co.* supra (200 U.S. 204, 50 L.Ed. 441, 26 S. Ct. 168); *Mankin v. United States*, supra (215 U.S. 540, 54 L.Ed. 315, 30 S. Ct. 174). But this method of protection is generally inadequate to cope with remote and undeterminable liabilities incurred by an ordinary materialman, who may be a manufacturer, a wholesaler or a retailer. Many such materialmen are usually involved in large projects; they deal in turn with innumerable sub-materialmen and laborers. To impose unlimited liability under the payment bond to those sub-materialmen and laborers is to create a precarious and perilous risk on the prime contractor and his surety. To sanction such a risk requires clear language in the statute and in the bond so as to leave no alternative.”

We respectfully submit that the judgment against these appellants finds no support in fact or law and should be reversed.

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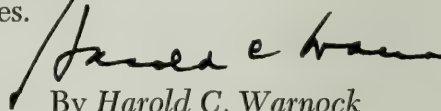
THE FLUOR CORPORATION, LTD.,
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VIGILANT INSURANCE COMPANY,
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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in dark ink, appearing to read "Harold C. Warnock", is written over a diagonal line that extends from the end of the preceding paragraph.

By *Harold C. Warnock*
Of Counsel

In the
United States Court of Appeals
FOR THE NINTH CIRCUIT

THE FLUOR CORPORATION LTD., ET AL
Appellants,

v.

UNITED STATES OF AMERICA
for the use and benefit of
MOSHER STEEL COMPANY and
MOSHER STEEL COMPANY,
Appellees.

No. 21307
No. 21307A
No. 21307B
No. 21307C

BRIEF OF APPELLEE MOSHER STEEL COMPANY RESPONDING TO THE FLUOR CORPORATION LTD., FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, GENERAL INSURANCE COMPANY OF AMERICA, SEABOARD SURETY COMPANY, AMERICAN RE-INSURANCE COMPANY, EMPLOYERS REINSURANCE CORPORATION and GENERAL REINSURANCE CORPORATION

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In the
United States Court of Appeals
FOR THE NINTH CIRCUIT

THE FLUOR CORPORATION LTD., ET AL
Appellants,

v.

UNITED STATES OF AMERICA
for the use and benefit of
MOSHER STEEL COMPANY and
MOSHER STEEL COMPANY,
Appellees.

No. 21307
No. 21307A
No. 21307B
No. 21307C

BRIEF OF APPELLEE MOSHER STEEL COMPANY RESPONDING TO THE FLUOR CORPORATION LTD., FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, GENERAL INSURANCE COMPANY OF AMERICA, SEABOARD SURETY COMPANY, AMERICAN RE-INSURANCE COMPANY, EMPLOYERS REINSURANCE CORPORATION and GENERAL REINSURANCE CORPORATION

I

JURISDICTIONAL STATEMENT

Jurisdiction with respect to the Fluor Corporation and its sureties as listed above, exists by virtue of Section 270A and B, Title 40 U.S.C., commonly known as the Miller Act. Jurisdiction on appeal has been invoked pursuant to 28 U.S.C., Sections 1291 and 2107, and Rule 73 of the Federal Rules of Civil Procedure.

II

STATEMENT OF THE CASE

In the interest of brevity Appellee Mosher Steel Company adopts and respectfully refers the court to the statements of the case contained in Appellee's briefs responding to Appellant Union and Appellant Ward.

The court having found that Mosher had a direct contractual relationship with Union and gave Fluor the written notice required by 40 U.S.C., Section 270B, a Judgment was rendered for Mosher against Appellant Fluor Corporation and its sureties for the work performed for the Davis-Monthan facility at Tucson, Arizona.

III

ARGUMENT

THE CONTRACTUAL RELATIONSHIP BETWEEN MOSHER AND UNION BEING DIRECT AND MOSHER HAVING GIVEN FLUOR THE WRITTEN NOTICE REQUIRED BY THE MILLER ACT, A JUDGMENT AGAINST FLUOR AND ITS SURETIES, UNDER THE MILLER ACT, IS ENTIRELY PROPER.

The Court is respectfully referred to the statement and argument contained in Appellee's brief in response to Appellant Union Tank Car Company for a statement of the testimony and evidence which amply supports the Trial Court's finding that Mosher had a direct contractual relationship with Union.

The position of Fluor and the sureties seems to be that, even if the contractual relationship between Union and Mosher is direct, it is not the type of relationship contemplated by the Miller Act.

Fluor and the sureties have found no case to support their contention, but merely say that Mosher's relationship was not covered by the Miller Act because its relationship with Union was not "as a material man, laborer, or sub-contractor." In arguing this point, Fluor and the sureties again, contrary to the Trial Court's findings, take the position that Union was merely a surety for IMI-Ward. Based upon the testimony and evidence, the trial court has found otherwise. It has found that the contractual relationship was direct, rather than collateral.

This being so, since Mosher was concededly a laborer and material man directly for Union under the Joint Venture purchase orders, and since Union was directly obligated to Mosher for the payment thereof, the contractual relationship between Mosher and Union was in fact "as a material man, laborer, or sub-contractor".

As pointed out in Appellee's briefs responding to the Union and the Ward contentions, the mere fact that Mosher was also bound, and performed labor and supplied material, under a direct contractual relationship with IMI-Ward, does not render the Mosher contractual relationship with Union any the less direct.

The final statement made by Fluor that "there is no conceivable way in which Fluor could protect itself in the fact situation presented by this case" is, of course, poppycock. The Miller Act letter sent by Mosher to Fluor, in which Mosher alleged a direct contractual relationship with Union, was sent to Fluor by Registered Mail on March 20, 1962 (PL 24) long before the Union work on the Davis-Monthan project was completed. In fact, the record shows that in

December, 1962, when Mr. Middleton left Union, there were claims on account of change orders in the amount of \$2,500,000.00 and that other claims for impact and acceleration for additional sums were processed after December, 1962. (RT 596, 597, 598).

CONCLUSION

Appellees respectfully submit that the Judgment against Fluor and the sureties is correct and should be affirmed.


Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


Frank H. Watkins, *Attorney*

No. 21307

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FLUOR CORPORATION,
LTD., ET AL.

UNION TANK CAR COMPANY
WARD INDUSTRIES CORPORA-
TION, now known as DRAGOR
SHIPPING CORPORATION,

Appellants
Cross Appellees

vs.

U.S.A., EX REL MOSHER STEEL
COMPANY,

Appellee
Cross Appellant

No. 21307
No. 21307A
No. 21307B
No. 21307C

REPLY BRIEF OF APPELLANT
UNION TANK CAR COMPANY

FILED

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No. 21307

IN THE

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

FLUOR CORPORATION,
LTD., ET AL.
UNION TANK CAR COMPANY
WARD INDUSTRIES CORPORA-
TION, now known as DRAGOR
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*Appellants
Cross Appellees*

vs.

U.S.A., EX REL MOSHER STEEL
COMPANY,

*Appellee
Cross Appellant*

**No. 21307
No. 21307A
No. 21307B
No. 21307C**

**REPLY BRIEF OF APPELLANT
UNION TANK CAR COMPANY**

Mosher complains in its statement of the case that it finds itself between Scylla and Charybdis (M.Br. 2). This dilemma is of its own making. Mosher's problem arises from the fact that it has asserted numerous conflicting theories against both Union and Ward. As a result, it no sooner attempts an explanation of its case on one theory of recovery than it discloses the fallacy of another.

Consider that Mosher at one time or another has sponsored evidence to prove (1) that its work was

performed pursuant to purchase orders issued by IMI individually, (2) that it was performed pursuant to purchase orders issued by the IMI-Ward joint venture, (3) that it was performed pursuant to an interim agreement signed by IMI's division manager on behalf of Union, (4) that it was performed pursuant to an oral contract made with Page during a November 15 telephon conversation, (5) that it was performed for IMI-Ward but orally guaranteed by Union during the November 15 telephone conversation, (6) that it was performed pursuant to a contract between Union and IMI-Ward with Mosher as a third party beneficiary, and (7) that it was performed in part on the strength of a bankruptcy court approved February 2 agreement to which IMI, Ward and Union were all parties. This fast and loose approach to the truth has served "greatly to complicate and confuse this case" (M.Br. 2), and thus far the complications and confusion have consistently worked to Mosher's advantage and to Union's decided prejudice.

Moreover, the opportunity for maneuver in this situation has not escaped Dragor's attention. Without challenging a single finding of fact in its specification of errors, Dragor writes a statement of the case which does not remotely resemble Judge Walsh's findings. The statement is in reality an unremitting argument that Union is solely and exclusively liable because Moore said "he concluded" the credit of IMI-Ward was "no good" and never "looked to" IMI or Ward for payment (M.Br., p. 34-9).

Mosher's answer to this argument reveals all the weaknesses and internal contradictions brought about by the inconsistent positions it has heretofore adopted. Mosher's witness Moore for example, saying that he was not looking to IMI for payment was plain nonsense

in view of the fact that the record shows Moore executed Mosher's sworn claim against IMI which resulted in a \$55,000 stock distribution in the IMI bankruptcy. As Judge Walsh said to counsel, "I know what he's testified to, Mr. Warnock, but the [proof of claim] document is in evidence" (R.T. 455).

As to expressions such as Moore's about credit, Professor Corbin states:

"This expression [to whom the promisee 'gave credit'] may very easily be confusing. When C lends money or sells goods on credit to P, he may very often do so without any expectation that P will ever pay and in sole reliance upon the financial responsibility of S. In one sense, C lent or sold on the 'credit' of S, because the 'credit' of S was good and the 'credit' of P was bad. S is nevertheless a surety and his promise is within the statute." (2 *Corbin on Contracts* (1950 Ed.) § 352 at p. 229.)

The record facts establish that because of Wilson's October visit, Mosher initially expected to receive a purchase order from Union's Graver Division on the Davis-Monthan work; that on October 31 Mosher learned no such purchase order would be forthcoming and was asked by Orr to accept IMI-Ward purchase orders covering that work as well as additional work for Vandenberg; that Moore agreed to accept the joint venture's orders but in addition wanted a guaranty from Union; that on November 15 Page agreed to guarantee Mosher's initial material shipment for Davis-Monthan but conditioned a broader guaranty on a letter of final approval requiring prior clearance from his superiors; that such final approval was not given; and that Mosher never again sought payment from Union until after the IMI bankruptcy and then only because plaintiff's officers "felt" there had been an oral guaranty.

With respect to Mosher's criticisms of our Statement of the Case (M.Br., pp. 5, 6), our opening brief was carefully referenced to the record and we have carefully reviewed those citations. We are satisfied that our Statement of the Case is meticulously accurate and that Mosher's criticism that our statement is "fragmentary" and "distorted" is irresponsible and wholly unjustified.¹ Counsel's ill-advised comments only serve to highlight the singular absence of any reference to the testimony or documentary evidence in the Statement of Facts contained in Mosher's brief, in violation of Rule 18 of this Court.

I.

THE COURT BELOW CORRECTLY REFUSED TO HOLD THAT UNION WAS LIABLE TO MOSHER UNDER THE OCTOBER 16 LETTER EITHER AS AN ORIGINAL OBLIGOR OR OTHERWISE.

There is no issue on this appeal with respect to the October 16 letter because the District Court declined to hold that Wilson's discussions with Mosher's officers, as reported in the October 16 letter, gave rise to a Union-Mosher contract. It rejected Mosher's proposed findings and conclusions that there was "an oral contract made on October 13, 1961 between Union and Plaintiff," or that "Sam Wilson was authorized to enter into this contract on behalf of Union," or that "in the alternative, Union ratified or adopted Wilson's actions," or that an oral contract was "memorialized in the interim purchase order dated October 16, 1961" (R. 1406,

¹ At page 6, counsel imply that our brief inserted or deleted quoted words, which is utterly false. For example, counsel complain that we used the word "assuring" referring to Moore's testimony (R.T. 354-5). Reference to page 355 of the transcript shows that this witness employed the word "assurance" on three separate instances on that page alone.

1390-2. Mosher filed no cross appeal challenging the District Court's action in rejecting these proposed findings and conclusions, because the record would not support them.

The October 16 Letter Did Not Purport To Be An Absolute And Binding Contract.

An examination of the October 16 letter reveals that the document *per se* did not purport to be an absolute and binding contract between Mosher and Union but was prepared by Mitchell in order to confirm with Wilson the terms which Mosher expected would be subsequently incorporated in a Graver purchase order. The second paragraph, for example, contemplates that a "purchase order will be forthcoming from Graver" and that "In the interim it would be appreciated if you [Wilson] would review the conditions of this order" (M.Ex. 1). Compare *Owens-Corning Fiber Corp. v. Fox Smith Sheet Metal Co.*, 351 P.2d 516 (Wash., 1960).

It also appears from the letter that Mitchell knew he was dealing with an IMI representative rather than an agent of Union. The letter states, at page 1, "The following conditions of this order are as follows and per agreed in conference between Mr. S. A. Wilson of Denver Steel & Iron Works Company and Paul H. Mitchell and R. L. Burton of Mosher Steel Company" (M.Ex. 1). Clause 18 of the letter states, "It is understood that all materials from *customer's plant in Denver* as well as materials used at mills, will be shipped to Mosher Steel Company, Houston, Texas" (M.Ex. 1). Mitchell admitted that the plant described was the Denver Steel & Iron Division of IMI (R.T. 116-7). Even the acceptance clause of the letter shows that Wilson signed as division manager for Denver Steel & Iron Work Company "for" Graver (R.T. 114-117, 147).

Mitchell testified that he knew Wilson since 1958 (R.T. 114) and was aware that he was an employee of Denver Steel & Iron Division of IMI (R.T. 115-6) and not an employee of Union Tank Car Company (R.T. 116). He admitted that it was his duty to determine "the authority of people who purport to be agents for other companies," (R.T. 117) was aware that Lionel Lancaster was Union's manager on the Davis-Monthan project (R.T. 117), and never checked with Lancaster to determine whether Wilson as an IMI employee had authority to negotiate contracts for Graver (R.T. 117).

Wilson Had No Authority To Execute Contracts With Graver

But assuming *arguendo* that the October 16 letter purported to be a binding contract, it remained incumbent upon Mosher to show that Sam Wilson, as IMI's division manager, had authority to act as Graver's agent in signing contracts on its behalf. No proof of this kind was ever offered and was contradicted by all the testimony in the record.

Wilson's activities in this incident should not be confused with his activities in the acquisition of raw steel for the joint venture. That was done under an arrangement embodied in the original contract between the parties (Jt.Ex. 8) and is fully explained at Page 5 of Union's opening brief. It had nothing to do with the subletting of the fabrication work involved in this case, which came about only when it became apparent that the joint venture would be unable to fulfill its commitments.

George Morton, IMI's president and joint venture manager, declared that he never authorized Wilson to delete the subject work from the joint venture contract. Morton testified, "At no time was Mosher to deal

with Graver in the matter of this subcontract. The subcontract was issued by IMI to Mosher, and we were and did have and retained responsibility for seeing that Mosher performed and our expeditors, our Joint Venture management, retained its control with Mosher to see that deliveries were made, to work up schedules, to do all the things which we would normally do with any subcontractor" (M.Ex. 29, p. 33).

Morton further affirmed that Wilson's trip to Mosher's plant came about as a result of instructions which he gave Wilson. Morton said that as a result of Graver's complaint about the joint venture being behind schedule, he decided to subcontract some of the joint venture work (M.Ex. 39, pp. 12-13). Morton testified (M.Ex. 39, p. 20):

"At the time it was decided to subcontract Sam Wilson was given the task of locating a subcontractor. He advised me that Mosher had the capacity to handle this work, that they were interested, and that he would like to go down to the Mosher plant, meet with the Mosher people, and see whether or not he could negotiate a satisfactory contract. I gave him permission to do so, told him to report back to me what he could — what the terms of this agreement would be and the terms of what it would cost us to have this work done."

Morton also testified that "as part of our contractual arrangements with Graver we were obliged to get their consent to subcontract and to the subcontractor, and so at this point, I believe it was at this point, Graver was brought into the picture" (M.Ex. 39, p. 21). Wilson conceded that he had never obtained any authority from his superior, Morton, to delete the Davis-Monthan work from the joint venture contract or to subcontract it out on Graver's behalf. Mosher sponsored Wilson as a

witness and was therefore bound by his testimony. He testified (R.T. 223):

“Q. Now again going back to our plaintiff’s Exhibit 1 for identification, you signed this document on behalf of Denver Steel and Iron works Company, did you not?

“A. That was my position at the time, yes.

“Q. And you showed that you were signing it as division manager of that company, is that right?

“A. I believe that’s the way it reads.

“Q. Now, did you get any authority from Mr. Morton who was president of that company to have Idaho-Maryland Industries, your employer, represent that Graver was going to issue a purchase order?

“A. No, sir.”

It therefore appears that Graver could not have dealt directly with Mosher without the consent of the joint venture because Graver had a contract with the joint venture to pay for the same work. This fact was known to Mitchell at the time (R.T. 116).

Moreover, Wilson’s lack of authority to execute contracts in Graver’s name was admitted by Wilson. He admitted that he had never received authority to sign a contract in Graver’s name and had never signed a contract in his entire life in the name of Graver (R.T. 224):

“Q. Now before you went down to Houston, or I guess it was Dallas, where you had a talk with Mr. Burton and Mr. Mitchell, did you ask Mr. Lancaster [Union’s project manager] for authority to sign a contract in their name?

“A. No, sir.

“Q. And did Mr. Lancaster tell you to sign the contract in their name?

“A. No, sir.

“Q. And you had never signed a contract in your entire life in the name of Graver?

“A. No, sir.”

Wilson also stated that he never asked for approval of his action in signing the October 16 letter (R.T. 225):

“Q. Now after this whole transaction was over or at any time after your receipt of this so-called letter of October 16, did you ever sit down with Mr. Lancaster and go over the terms and provisions of this contract?

“A. I do not believe so.

“Q. Did you ever go over the terms and provisions before signing it?

“A. No, sir.

“Q. Did you ask Mr. Harle for authority to sign this contract?

“A. No, sir.”

These two men were the only Graver employees having to do with this matter who Wilson ever met during the course of the entire transaction.

Accordingly the testimony of plaintiff's own witnesses shows that Wilson had no authority from IMI (R.T. 223) or the joint venture (M.Ex. 39, pp. 30, 23) or from Graver (R.T. 224) to sign the October 16 letter and did not represent to Mosher that he had such authority (R.T. 302). Wilson testified (R.T. 212):

“Q. Now you never at any time in all the time that you dealt with this [steel procurement] matter, you never at any time issued any purchase order in the name of Graver, did you?

“A. No, sir.

“Q. And nobody ever told you to issue a purchase order in the name of Graver, did they?

“A. No, sir.

“Q. And all you ever did on that was to issue a requisition in the name of IMI, is that right?

“A. That’s right.

“Q. And pursuant to that Graver issued its own purchase order and credited on this contract, is that right?

“A. That’s right.”

The October 11, 1961 meeting in Denver was the only meeting prior to the time Wilson signed the letter at which any Graver representative was present. Lancaster, while not a witness at the trial, in his deposition categorically denied that he gave Wilson at that meeting any authority to sign or negotiate a contract in Graver’s name (U.Ex. WWWW, pp. 22, 55). Harle also testified that he gave Wilson no such authority, and Wilson admitted, “Tom [Harle] didn’t talk much in those meetings” (R.T. 188). However, Wilson did attribute to Lancaster the statement that “a Graver purchase order would be forthcoming if I could negotiate a satisfactory deal” (R.T. 234, 188).

Assuming that the words attributed to Lancaster by Wilson were true, they certainly could not be construed as appointing Wilson a special agent for Graver to concluded a contract in Graver’s name or to sign a contract on its behalf. The statement that a purchase order would be forthcoming “if I can negotiate a satisfactory deal” conferred no authority on Wilson to determine in his own discretion whether the deal was satisfactory or to execute a contract on the basis of his own personal conclusion. The authorities so state:

“Authority, actual or apparent, to seek purchasers, solicit orders, or to conduct negotiations with a view to sale gives no power to enter into an absolute and binding contract, or a contract to sell without obtaining the principal’s approval . . .”

Dayton Bread Co. v. Montana Flour Mills Co., 126 F. 2d 257, 261 (6 Cir., 1942).

“Ordinarily one authorized merely to initiate or carry on negotiations for a contract or to receive proposals to be submitted to the principal has no implied or apparent authority therefrom to enter into a binding contract as to the subject matter involved in the negotiations.” 2 C.J.S. *Agency*, § 104, p. 1248.

See also *Anheuser-Busch v. Grovier-Starr Produce Co.*, 128 F. 2d 146, 152 (C.A.10, 1942); *Nunnally v. Hilderman*, 373 P.2d 940 (Colo., 1962); *Equitable Mortg. Co. v. Thorn*, 26 S.W. 276, (Tex. Civ. Ap., 1894).

Wilson's Action Was Never Ratified.

Absent proof of actual authority the October 16 letter could never have become a binding contract unless some Graver official ratified Wilson's action in signing that document. Any inquiry as to whether ratification occurred must of necessity be limited to the time period between October 20, when Wilson signed the letter, and October 31, when Orr advised Moore, Burton and Mitchell “that no purchase order from Graver would be forthcoming” (R.T. 796-8, 264). During the eleven-day interval the only meeting between any Graver representative and Mosher occurred at the October 23 meeting in Denver, attended by Harle of Graver and Burton of Mosher. (R.T. 255). This was a meeting of production men designed to establish a procedure whereby plate steel which Graver had purchased pursuant to joint venture requisitions (R.T. 925) and delivered to Denver Steel & Iron was to be transferred from Denver to Houston (R.T. 312-3, 945-6). As Graver's expediter (R.T. 292) Harle was responsible for facilitating the rail shipment of the steel (R.T. 293).

Burton testified that during the course of the

Denver meeting no discussion of any financial matters occurred (R.T. 313), and Wilson admitted in his deposition that at the time of the October 23 meeting Harle did not even know that Wilson had signed the October 6 letter (R.T. 225). In order to show ratification, plaintiff would have had to establish that Harle was empowered to approve Wilson's action, that he was furnished with the material facts, and that he was aware that his approval was being sought. *Restatement of Agency* 2d, § 93. However, it was conceded by Moore (R.T. 392), Mitchell (R.T. 120) and Burton (R.T. 292) that they at all times understood that Harle was not authorized to contract on behalf of Graver for the purchase and payment of the fabricated steel which Mosher subsequently delivered under the IMI-Ward November 3 purchase orders. It was also admitted by Mosher's agents that Harle had at no time promised anyone at Mosher that he would execute a purchase order (R.T. 303), and that neither Burton nor Mitchell nor Moore ever asked Harle or anyone else at Graver to issue a purchase order (R.T. 120, 308, 396).

Beyond this, the record shows that as soon as responsible people at Graver learned that Mosher had circulated a letter drafted for Wilson's signature and referring to a forthcoming Graver purchase order, they immediately took exception to the action. Branting stated in his memorandum, "It is my understanding that Denver Steel & Iron was to subcontract the work which could not be handled in their own shop, not to commit Graver to pull their chestnuts from the fire" (Union Ex. G; R.T. 513). Lancaster, the Graver project manager, sent a TWX back to Branting, saying, "This was taken care of directly and immediately with George Morton. Mosher has received a purchase order from Idaho-Maryland Industries, Inc. and Graver Tank Mfg. does

not enter into it" (Union Ex. M).

Morton at once dispatched Orr and Holmes to Texas in order to get the matter straightened out with Mosher (R.T. 790-791, 789). As a result of this visit to the Mosher plant on October 31, Mosher's officers knew at once that no Graver purchase order would be forthcoming. From that date onward and until this suit was filed, Mosher never asserted a claim against Graver on the theory that the October 16 letter constituted a contract between plaintiff and Union. Thus Moore, in all of his subsequent conversations with Harle, never contended that Union was bound to pay by reason of the October 16 letter (R.T. 395, 6):

"Q During your various conversations with Mr. Harle, you never made any claim under the October 16 letter?

"A No.

"Q At your conference in Dallas February 16, no such claim was made under the October 16 letter?

"A No.

"Q You said you talked to Mr. Page twice. You never told Mr. Page in either conversation that you claim Graver was liable to you under that letter of October 16, did you?

"A No.

* * *

"Q You never wrote any letter to Graver saying: See here, your agent signed a letter of October 16 and we expect to be paid under it. No such letter or anything like it in your files, is there?

"A No."

Again, when Messrs. Mosher and Moore visited Union's office in Chicago following the IMI bankruptcy, at no time during the meeting was any claim made that

Union was liable under a purported contract signed by Mr. Wilson (R.T. 867-9).

Burton similarly conceded that after the October 31 meeting with Orr he never again discussed or claimed that a purchase order was forthcoming from Graver by reason of the October 16 letter (R.T. 303):

“Q You didn’t ask Mr. Lancaster for a purchase order, did you?”

“A No, sir.

“Q And you never discussed a purchase order with Harle after October 23 when you met with him in Denver?”

A. No, sir, I don’t believe I did.”

We submit these facts fully sustain Judge Walsh’s refusal to enter Mosher’s proposed findings and conclusions with respect to the October 16 letter.

II.

MOSHER AGREED TO PERFORM THE DAVIS-MONTHAN AND VANDENBERG WORK PURSUANT TO IMI-WARD’S NOVEMBER 3 PURCHASE ORDERS BUT IN ADDITION UNSUCCESSFULLY SOUGHT A GUARANTY OF PAYMENT IN THE EVENT THE JOINT VENTURE FAILED TO PAY. (Reply to M.br. pp. 16-19)

Union throughout these proceedings has contended that what Mosher sought but was never promised during the November 15 Moore-Page telephone conversations was a conventional guaranty of the joint venture’s November 3 purchase orders. Ward, as well as Mosher, has consistently disputed this contention because Ward recognized that a request for such a guaranty necessarily presupposed the existence of an underlying IMI-Ward obligation to pay (Ward br. pp 21-40). The Court below held that just such an underlying obligation of

IMI-Ward existed (Conc. 4, R. 1238) by reason of Orr's October 31 meeting with Mosher pursuant to which the joint venture's November 3 purchase orders were issued. See Findings of Facts Nos. 29 and 30. These findings have not been challenged by anyone on these appeals, either in a required Specification of Error or otherwise. They are not only supported by substantial evidence but by uncontroverted testimony.

The clearest narrative account of events at the October 31, Dallas meeting was given by Wallace Orr, who was the joint venture officer directed by joint venture manager Morton to conclude a subcontract between Mosher and IMI-Ward. Orr testified that he came to IMI in 1960 on loan from Radiation Incorporated (R.T. 821) and later that year became IMI's assistant vice president and assistant manager on ballistic missile programs (R.T. 822, 245). Shortly after the inception of the joint venture, he was appointed by Morton to serve as "Director of Contracts for the IMI-Ward Joint Venture (R.T. 786). As director of contracts for the joint venture his "duties and responsibilities included the negotiation of all the contracts for the joint venture and the administration of these contracts" (R.T. 786). These duties were performed under the direction of Morton who was given authority under the joint venture agreement to make all necessary "commitments related to the normal performance of the joint contracts" with Graver (Jt. Ex. 7, Para. 6).

Orr testified that his trip to Mosher's Houston office came about as a result of instructions received from Morton (R.T. 790-1). Morton gave him an unsigned copy of Mitchell's October 16 letter, which the former described as a "proposal from Mosher" (R.T. 789, 790, 801, 806). Morton told him "that there had been some discussions or a proposal made by Mosher Steel with

Mr. Sam Wilson" (R.T. 791). Morton had previously instructed Wilson to report to him on those negotiations (M.Ex. 39, p. 20). Lancaster had also called the negotiations to his attention as a result of Branting's "chest-nuts-out-of-the-fire" memorandum (U.Ex. G).

Morton told Orr "that we had no contract with Mosher to protect the Joint Venture, we had to get it on contract, but the time for delivery was extremely short and he wanted me to go down and negotiate the subcontract with Mosher" (R.T. 803). He instructed him "to go to Houston to get together with the people from Mosher to negotiate a contract or a subcontract between the Joint Venture and Mosher for the protection of both parties" (R.T. 971). Orr was accompanied on the trip by William Holmes, who was "Manager of Construction" for the joint venture (R.T. 971). They took with them the cutting lists for the steel that had been prepared by the engineering department of Denver Steel & Iron (R.T. 792).

At Houston, Orr and Holmes met with Burton, Mosher's production vice president (R.T. 792). They discussed the purchase order which the joint venture proposed to issue on the Davis-Monthan work as well as an additional purchase order for fabrication on the Vandenburg part of the job (R.T. 792). Burton told him these matters were outside his province and would have to be discussed with Mosher's "finance people" in Dallas (R.T. 792).

Burton, Orr and Holmes flew to Dallas the same day for a further conference at Mosher's Dallas office (R.T. 793). Orr testified that in addition to Burton, Mitchell and Moore participated in the meeting (R.T. 793, 805). Moore said he took part by telephone (R.T. 352). The meeting lasted "approximately an hour and a half" (R.T. 796).

During the meeting Orr reiterated his request that Mosher accept a purchase order from the joint venture concerning the Davis-Monthan work previously discussed with Wilson as well as a further purchase order covering \$20,000-\$30,000 additional work for Vandenberg (R.T. 808-9). Orr testified that "the substance of the conversation at that time was to go over the prices to be established for the fabrication of this steel. We came to an agreement on the price at \$160 a ton, and on any material that was furnished by Mosher they would charge the Joint Venture \$170 a ton" (R.T. 793).

The subject of credit was also brought up during the meeting. Orr declared, "The question was raised, . . . by I think Mr. Moore, as to the financial capacity of Idaho-Maryland Industries. And at that time we pointed out to Mr. Mitchell and Mr. Moore that this was not a negotiation for Idaho-Maryland Industries itself, . . . we represented the Joint Venture of Idaho-Maryland Industries and Ward Industries, and if he cared to check Dun & Bradstreet, I think at that time Ward Industries' net worth was something in the neighborhood of \$11,000,000. We were talking about a \$300,000 order, with the addition of the Vandenberg material fabrication, which was somewhere in the neighborhood of \$25, or \$30,000 more" (R.T. 795). Mosher's officers answered by saying "that Idaho-Maryland Industries did not have credit, they would not accept an Idaho-Maryland Industries purchase order", but Orr once more "pointed out to him that we were submitting a Joint Venture purchase order for the material" (R.T. 796).

After that Orr related that "there was discussion back and forth on it" and "they [Mosher's officers] went out and made several telephone calls, I do not know to whom" (R.T. 796). Orr next stated (R.T. 796-7):

. . . "[T]hen Mr. Moore and Mr. Mitchell agreed

to accept the purchase order of the joint venture which I was to go back and . . . I would go back and incorporate in the purchase order the items we had agreed upon, and that I would have it in the mail to them as soon as I could get back to Los Angeles. This I did do. There were to be two separate purchase orders, one covering Vandenberg and one covering the Tucson job."

Orr gave Burton the cutting lists which he and Holmes had brought along from Los Angeles (R.T. 792). Burton said that as "he now had the cutting lists and he felt that they could go back and get started to work on the job provided we would get the purchase order in immediately" (R.T. 809). Orr related the final thing "said was that they would accept the purchase order from the joint venture" (R.T. 814).

Orr and Holmes then returned to Los Angeles where Orr advised Morton and Vernon John of what had taken place (R.T. 834). He also instructed Frank Wright, the purchasing officer of the joint venture, to prepare separate purchase orders covering the Davis-Monthan and Vandenberg work (R.T. 798). Orr testified, "I gave Mr. Wright a copy of this proposal letter [Mitchell's letter of October 16] and told him to prepare the purchase orders in accordance with the paragraphs I designated in the proposal letter, plus other items" (R.T. 855). Orr identified Joint Exhibits 9 and 10 as the November 3 purchase orders he directed Wright to prepare (R.T. 979-8). When asked why the purchase orders were prepared on IMI forms Orr testified, "I did not [have joint venture forms], until later when we got a stamp which said Joint Venture, but at this time we didn't have the forms, we used the IMI forms for the Joint Venture" (R.T. 856).

On November 8 Frank Wright also sent Mosher a

supply of receiving report forms to cover shipments to the joint venture (Jt.Ex. 44; R.T. 145, 103).² After that Orr said, "They started making their deliveries, we received in the Joint Venture office their shipping documents which we matched with the receiving documents, they were attached to an invoice and then sent to the United California Bank on all the shipments that were made . . ." (R.T. 817). They were assigned to the Bank pursuant to the financing arrangement negotiated between the Bank and the joint venture (R.T. 859-860).

The foregoing account of the transaction fully supports Judge Walsh's conclusion that "Ward, as a member of IMI-Ward, is obligated to Mosher by reason of Mosher's performance of the terms and provisions on Mosher's part contained in Joint Exhibits 9 and 10 . . ." (Conclusion 4, R. 1238).

III.

THE NOVEMBER 25 PAGE-MOORE TELEPHONE CONVERSATION RESULTED IN NO GUARANTY BEYOND MOSHER'S FIRST SHIPMENT TO DAVIS-MONTHAN BECAUSE UNION DECLINED TO GIVE FINAL APPROVAL ON ANY BROADER COMMITMENT. (Reply to M.br. pp. 20-80)

The central issue presented on this appeal is whether the District Court correctly held that "Page's telephone conversation with Moore on November 15" had the "legal result" of obligating Union "to pay Mosher directly for all sums becoming due to Mosher" under the joint venture purchase orders (Conclusions 6, Findings

² Jt. Ex. 44, dated Nov. 8, 1961 reads:

"Transmitted herewith are 100 Idaho Maryland Industries Inc. — Ward Industries Corp. Receiving Reports in accordance with your request of today.

These documents are to be used in conjunction with work called for on our Purchase Order Nos. 15917-2 and 15925-2."

35 and 39). Determination of this issue necessarily depends upon a careful examination of the Page and Moore testimony concerning that conversation and that which preceded it on November 7. Yet all that Mosher's brief states with reference to the conversations is that Union has seized upon the "sometime characterization and the non-legal use of the word 'guaranty' by Mr. Moore" (Mosher Br., p. 50). The fact is that throughout the record Moore consistently referred to the alleged agreement as a promise to pay in the event the joint venture failed to pay which was embodied in a "letter of final approval" or a letter "outlining the agreement". Only once did Moore leave out "if the joint venture failed to pay" language in his testimony (R.T. 361-2), and even then corrected himself later on cross-examination. We draw together all of the significant testimony of Moore on this subject for this Court's scrutiny.

November 7 Conversation

Moore testified that he only spoke twice with Page on the subject of Union's "responsibility" for payment. The first of those conversations occurred on November 7. He stated that the conversation came about as a result of Harle's inquiry as to when the first shipment for Davis-Monthan could be expected (R.T. 354, 267). He told Harle that the shipment would not be released unless Graver would be responsible for payment (R.T. 354-5). Harle said to him that the one person at Graver who could give such assurance was John Page (R.T. 355). A telephone call was put through to Page and Moore for the first time testified that he was seeking assurance that Graver would pay "if we did not receive our money" from the joint venture. He stated (U.Ex. UUUU, p. 22):

"It was a very brief conversation with Mr. Page

and I just told him that they would have to agree to withhold payment from the Joint Venture, IMI-Ward, to pay us *if we did not receive our money*. John Page said that he could not grant this unless he had received the approval of Mr. Morton, the President of IMI.” (Emphasis supplied.)

When examined once more on the same subject Moore reiterated that Graver’s assurance of payment was being sought “if we were not paid within the terms of the sale”, and identified the terms as those described in the IMI-Ward November 3 purchase orders (R.T. 355-6):

“Q. You say then you talked to Mr. Page?

“A. Yes.

“Q. What did you say to Mr. Page?

“A. I told Mr. Page we would have to have assurance, that *if we were not paid within the terms of the sale* that they would be responsible for paying Mosher Steel Company.

“Q. And what were the terms of the sale?

“A. *Thirty days net, one-half of one percent ten days.*

“Q. What did Mr. Page say to you?

“A. Mr. Page said he was not in a position to carry out my request without the approval of Mr. Morton, Manager of IMI-Ward Industries, Joint Venture.” (Emphasis supplied.)

Examined a third time, Moore once again affirmed that he was seeking a guaranty (R.T. 408):

“Q. . . . As I recall your testimony, on that November 7, you telephoned Mr. Page and up to that time nothing had been done about contacting Graver or getting in touch with them with respect to their paying you if payment was not made under the IMI purchase order.

“A. No, I had not made any contact with them.

“Q. So you called Mr. Page and you told Mr. Page that you didn’t want to go ahead with this change or substitution unless Graver would agree to pay you *if IMI failed to do so?*

“A. Yes.” (Emphasis supplied.)

Moore’s account of the November 7 telephone conversation was corroborated by his associate, Burton. The latter testified that he, along with Harle, was present at the November 7 meeting when Moore called Page (R.T. 320). He confirmed that following the conversation Moore told them that he was asking for an agreement that Graver would pay if IMI would fail to pay (R.T. 322):

“Q. I am asking you whether or not Mr. Moore did not say after that conversation that . . . he was asking Page to get an agreement or letter that Graver would pay *if IMI failed to pay.*

“A. *I believe that is essentially correct.*” (Emphasis supplied.)

November 15 Telephone Conversation

Moore’s testimony concerning the November 15 telephone conversation establishes that he sought no different type of obligation on that date than had been discussed on November 7. The word “direct” crops up in his testimony but only with reference to an agreement “to pay us direct if we did not receive the money.” Moore said (U.Ex. UUUU, p. 27):

“I asked him what — had he gotten approval from Morton so we could proceed with the order that the service department wanted a release on it, and he said he had gotten approval of Morton and that *they would pay us direct if we did not receive the money* and withhold the money, of course, from

the IMI-Ward, the amount that they paid us.”
(Emphasis supplied.)

He was then asked whether the existence of an indebtedness from which Graver might deduct money from the joint venture was expressly made part of the bargain. Moore was equivocal on this point but reiterated that Mosher was to be paid “if we were not paid by the joint venture.” He testified (U.Ex.UUUU, p. 33):

“Q. Now the understanding was that if you didn’t get paid by the joint venture Page was to withhold money from the joint venture to pay Mosher?”

“A. We were to be paid. Now whether he would withhold it from the joint venture, that would be something else, but that was the idea, of course.

“Q. *But only if the joint venture didn’t pay you?*

“A. *Yes, if we weren’t paid on time by the joint venture.*”. (Emphasis supplied.)

Moore was next asked whether he had related the terms of the sale to Page, an item which certainly would be mentioned if there was a “direct” contact with Graver. He related (R.T. 409):

“Q. . . . [A]t that time you told him again that you were insisting that Graver pay *if IMI failed to pay within the terms of the order*, is that right?”

“A. Yes.

“Q. And you said that the terms were thirty days net, or one-half per cent discount within 30 days, something like that?”

“A. That was our terms. *I didn’t relate the terms in our conversation.*” (Emphasis supplied.)

Thus Moore at all times regularly and consistently referred to the alleged agreement as an obligation to pay

in the event IMI and the joint venture failed to pay, with the exception of one instance during his direct examination on Friday, November 20, when he dropped that expression (R.T. 361-2). This instance did not pass unnoticed at the trial. At the first opportunity he was asked and denied that he thereby intended to indicate a change in his testimony (R.T. 456):

“Q. Do you remember when your deposition was taken in my office on June 28, 1963? Looking at page 33 . . . line 1:

‘Q. Now the understanding was that if you didn’t get paid by the joint venture Page was to withhold money from the joint venture to pay Mosher?’

‘A. We were to be paid. Now whether he would withhold it from the joint venture, that would be someone else, but that was the idea, of course.

‘Q. But only if the joint venture didn’t pay you?’

‘A. Yes, if we weren’t paid on time by the joint venture.’

“Q. Now that was your testimony at the time of that deposition, wasn’t it?

“A. Yes.

“Q. *And you testified here Friday to the same effect, didn’t you?*

“A. Yes.” (Emphasis supplied.)

Moreover, Moore’s testimony, unless read with the fixed purpose of arriving at a contrary conclusion, showed that even he realized that guaranty depended upon receipt of a “final approval” letter from Page. He said Page told him “he would write me a letter in a day or two giving final approval on this agreement” (R.T. 361) and that he had expected “a letter in a day or two outlining this agreement” (R.T. 362). Moore expressly acknowledged that the wire received from Page guar-

anteing the first shipment was not the final approval he was awaiting. He testified:

“Q. This is what you told Mike in answer to his inquiry: ‘I have a wire from Mr. Page. Graver guaranty account of Idaho-Maryland. You may mark it open.’ Now, Mr. Moore, didn’t that TWX there, mean you understood Mr. Page’s telegram to be a guaranty of the entire account?

“A. I *understood* all the time it was *supposed to be* a guaranty of the entire amount.

“Q. The telegram was?

“A. I had assurance from the very beginning. Yes, I *expected* the entire amount *to be* guaranteed. (R.T. 415-6)

* * *

“Q. Then why did you ask for a letter?

“A. I don’t recall that — he promised the letter and I don’t know that it was strict on my request that he did. It was *understood* all the time from November 7 he *was to give* us this okay. (R.T. 414).

* * *

“Q. Now, you ignored this telegram when it was received, didn’t you?

“A. Yes.

“Q. You didn’t pay any attention to it at all?

“A. I paid attention to it that it said the fact I *was to receive* the letter in a day or two.” (R.T. 413) (Emphasis supplied.)

The foregoing testimony, fairly read, certainly confirms in every material respect Page’s comparable testimony that beyond the first shipment he had first to secure the approval of his “higher ups” before sending a letter giving “final details” (R.T. 742, 744, 759). It is further corroborated by Burton’s testimony which shows that Moore recognized his conversation with Page created no obligation (R.T. 330):

“Q. Have you ever asked him [Moore] whether or not he simply misread that telegram from Mr. Page? Have you? You ought to be able to answer that question right quick.

“A. Yes, I have asked him that.

“Q. What was his explanation?

“A. *He depended upon a letter to follow that set out the rest of the requirements as he understood them.*” (Emphasis supplied.)

Accordingly, the situation is exactly the same as in *Merritt-Chapman*, where this Court held that “conversations relating to a ‘promised’ purchase order” were “nothing more than negotiation” and gained “no greater legal significance” from what the complaining party “understood”, *Merritt-Chapman & Scott Corp. v. Gunderson Bros. Eng. Corp.*, 305 F. 2d 659, 663-4. *Moreover, the testimony of Moore and Page can be searched high and low without finding a single reference during these negotiations to a discussion of any work other than for Davis-Monthan. The Vandenberg job was never mentioned.*

Moore’s conduct is entirely inconsistent with a professed belief that Mosher had a direct contract with Union. Actually, he asked for a guaranty, and failed to follow up his request. Considered on this basis, his testimony is entirely consistent:

1. It makes sensible Page’s November 15 telegram (Jt.Ex. 22) which guarantees payment of the first Davis-Monthan shipment and refers to a letter to follow containing “complete details” — a contemporaneous document which was never challenged as inaccurate until after IMI’s bankruptcy;

2. It explains why the Mosher shop order for the Davis-Monthan work was amended (Jt.Ex. 13) for the purpose of *changing* the customer’s name from Graver to IMI — a senseless act if Moore only hours before had

concluded a “direct” contract with Graver;

3. It explains why Graver’s officers considered but rejected (Jt.Ex. 21, 24) enlargement of the telegram guaranty — again a totally meaningless conference if a “direct” contract covering Davis-Monthan were already in existence;

4. It explains why Mosher sent all invoices (Jt.Ex. 14) to IMI rather than to Graver (R.T. 397-8), the latter being the party who would ordinarily receive such invoices if a “direct” contract had been negotiated;

5. It explains why change orders (U.Ex. VVV-ZZZ, R.T. 129, 136) were negotiated with IMI rather than with Page or anyone at Graver, which would have been mandatory if a “direct” contract existed;

6. It explains why the joint venture invoices covering the Mosher work were assigned to the United California Bank (U.Ex.III, JJJJ, R.T. 860) — again an act which under a “direct” contract approach would have Union paying both Mosher and the joint venture for the same work;

7. Finally, it explains why, before Mosher’s lawyers entered the picture upon IMI’s bankruptcy, Mr. Mosher and Mr. Moore told Van Gorkom that “they felt that there had been an oral guarantee made by the Union Tank Car Company” but made “no claim made whatsoever that bore on a direct relationship between Union Tank Car Company and Mosher” (R.T. 867-8).

Mosher Statute of Fraud Cases

Plaintiff cites no less than thirty-five cases in an effort to convince this Court that a promise to pay in the event another fails to pay is really not a promise covered by the statute of frauds. Mosher does not dispute that under conflicts principles the Illinois statute applies. Yet half the cases cited are from jurisdictions other than Illinois. Obviously these cases cannot be

individually analyzed in a reply brief. However they fall into categories which immediately distinguish them from the present case. The important fact is that no case cited holds the statute inapplicable where a contractor is alleged to have orally promised a materialman about to deal with a subcontractor that he will pay for goods to be delivered to the subcontractor in the event the latter fails to pay.

The first category of cited cases involves the "main purpose" or "leading object" doctrine. *Clifford, Schoenfeld, Whiting, and Holmes* are typical of this group. (M.Br. p. 59, 61). They hold the doctrine applicable where three elements are present: (1) a default on the part of a third person to pay money presently owing the promisee; (2) *a repudiation* of the contract by the promisee with the third person by reason of the latter's default; and (3) *an unqualified promise* by the promisor to pay the third person's debt and/or to pay for further work performed or material furnished in order to induce a resumption of work. This is also true of each illustration under Section 184 of the *Restatement of Contracts*.

None of these elements are present in this case. The joint venture certainly had not defaulted in payment under its purchase orders at the time of the November 15 conversation. Nor had Mosher repudiated these purchase orders because it had not been paid. Instead it sought to obtain from Graver a guarantee of IMI-Ward's order so as to avoid relying solely on the credit of the joint venture. Professor Corbin points out that in such a situation the "main purpose" doctrine is inapplicable. He declares, at 2 *Corbin on Contracts*, § 369, pp. 290-1:

"Where there is nothing to show that the building contractor is failing to perform his contract with

the owner, or that the latter is not likely to get the construction for which he had contracted, a promise by him to see that some bill for labor or material is paid by the contractor is probably to assist that contractor in getting credit and is not a promise for benefits received by the promisor."

The main purpose rule does not take the case out of the statute where the promise is to pay only in the event that another fails to pay. See *Brown & Root, Inc.*

Mosher's next category is comprised of third party beneficiary cases such as *Granite City, Wilson v. Bevans*, and *Wickham v. Hyde Park*. As discussed *infra*, this case does not involve a third party beneficiary contract because there is no showing that Union made a promise to IMI-Ward for Mosher's benefit.

A third category concerns situations in which a contractor orders and promises to pay a materialman for supplies to be delivered to a third person. *Peter v. Raven*, 159 Ill. App. 122, and *Lusk v. Throop*, 189, Ill. 127, fall in this group. For example, in *Lusk* the evidence established that "Lusk told them (plaintiffs) to furnish Carlson & Olson with what groceries and supplies they wanted, and they would pay for them." The case obviously involves an absolute promise, not a promise to pay only in the event a third person fails to pay. Yet it is this case which Mosher contends has by implication overruled the *Heggie* decision at pp. 43-4 of our opening brief.

Still a fourth category of these cases concerns the part performance doctrine applicable to contracts for the sale of lands and, in some jurisdictions, to contracts not to be performed within a year. 2 *Corbin on Contracts* (1950 Ed.) § 459 at p. 581. *Wilson, Fleming, Marr and Pettus* (M.Br., p. 69) are land contract cases and involve no promise to answer for the debt of an-

other. The doctrine of part performance is inapplicable to guaranties because a suit on a guaranty, oral or otherwise, necessarily arises *only after performance* by the alleged promisee.

Although citing thirty-five decisions Mosher has been unable to bring itself within the main purpose rule because (a) at the time Mosher sought a promise from Union, IMI-Ward was not in default under its contract — indeed, Mosher had accepted the joint venture's purchase orders and payment was not yet due, and (b) there was no direct or substantial consideration flowing to Union from Mosher. True, Union had an interest in prompt performance by IMI-Ward, but as the Fifth Circuit sagely observed in *Brown & Root Inc. v. Gifford-Hill & Co.*, 319 F.2d 65, 69, "Completely uninterested persons do not guarantee the debts of others."

Mosher was not the only fabricator of steel, and even if Mosher's refusal to perform caused IMI-Ward to breach its subcontract, Union had its remedies for such default.

What Mosher sought, the evidence shows, was a guaranty, and if as the trial court believed Page orally promised a guaranty, that promise is unenforceable under the State of Frauds.

In concluding its argument Mosher quotes out of context language from *Resseter* as support for the novel proposition that under Illinois law a promise can *never* be within the statute unless there is an existing debt *due and unpaid* at the time the promise is made (M.Br., p. 74). The existing debt requirement mentioned in *Lusk* as well as *Resseter* is explained in *Illinois Surety, v. Munro*, 209 Ill. App. 407-414:

"The rule to the effect that before a promise can be held to be collateral it must be shown that there is an existing debt of some other person to

which the promise can be collateral is a correct rule but should not be understood as meaning that the debt of the other person must be in existence *at the time the collateral promise is entered into* but as meaning that there must be an actual binding promise of some other person to the creditor, for, without such original obligation, the promise cannot be collateral. The question of *when* the debt of the other comes into existence is not important, just so long as it *does* come into existence." (Emphasis supplied.) To the same effect, 2 *Corbin Contract*, (1950 ed.) § 372.

Mosher's authorities suggest no statute of frauds test other or different from that set out in the leading Illinois precedent on the subject, that is "*whether or not the party sought to be charged was to be liable at all events or only in case the other party fails to pay.*" *Ault v. Associates Discount Corp.*, 43 Ill. App. 2d 409, 414, 193 N.E. 2d 226, 229 (1963).

Illinois Estoppel Cases

Mosher's brief confirms our assertion that the so-called fraud of which plaintiff complains is Page's failure to keep the promise attributed to him by Moore to write a letter of final approval within a "few days" (M.Br., p. 75-80). This is exactly the type of conduct that the Illinois Supreme Court in *Loewenberg*, *Ozier* and *Sinclair* has unequivocally held does not constitute actionable fraud at law and does not give rise to an estoppel precluding a party from asserting the statute of frauds (Union br. pp. 49-51). These decisions have been so recognized in the Illinois law literature. (See 31 *Chicago Kent L. Rev.* 18; *Illinois Law Forum* (1954) p. 544.)

Even if the Illinois law were otherwise, we fail to understand how Mosher can claim to have acted in rea-

sonable reliance upon Page's alleged promise. A promise made on November 19, 1961 to send "final approval" letter in a "few days" might induce reliance and the performance of work, for a few days, or even a few weeks in anticipation of its arrival. But when no such letter is received in that period of time and Mosher does nothing to check on the matter, the suggestion that plaintiff is still "relying" thereon right through and even after the February 2, 1962 IMI bankruptcy is beyond credence. Such monumental and unswerving reliance, had it occurred, would certainly have been reflected somewhere at some time in some writing in Mosher's records. Yet Burton conceded that no such writing was ever found (R.T. 311):

"Q. Is there in existence, to your knowledge, in the files of Mosher Steel Company, any letter directed to your own company's personnel or to Graver or to anyone else up to the time of the bankruptcy which suggests that Graver Tank Company had guaranteed the account of IMI, or the account of the joint venture? Did you write anybody a letter or anybody in your company write such a letter?

"A. Not that I have seen."

IV.

THE COURT ERRED IN HOLDING THAT AN AGREEMENT EXISTED BETWEEN UNION AND IMI-WARD FOR MOSHER'S BENEFIT.
(Reply to Mosher Brief, pp. 80-86)

Mosher fails to resolve the mystery of just how and through whom Union and IMI-Ward concluded a third party beneficiary contract whereby IMI-Ward agreed that Union might pay Mosher for its work after acceptance of the work by IMI-Ward and deduct Mosher's invoices from the contract price between Union and

Ward (Conclusion 8, R. 1239). Such a contract, if it existed, certainly must have been based on an offer and acceptance by someone in the companies concerned.

Vernon John did prepare a letter authorizing the payment of Mosher invoices approximating \$225,000 (not \$321,000) after acceptance of Mosher work and the deduction "of such payment from our joint venture contract price" (Jt.Ex. 26). However, this letter was prepared because of Page's earlier advice that a "guaranty would be *considered* only upon the written request of Mr. John which must include an agreement that any payment . . . would then be withheld from IMI-Ward's progress payments" (U.Ex. K).

If John's letter is supposed to constitute the offer underlying the third party beneficiary contract, then Page could hardly have accepted that offer because the Court found "John's letter was not received in Page's office until December 11, 1961, by which date Page had left his office permanently" (Finding 34, R. 1231). While the Court also found that Harle on November 14 "saw" a copy of the letter in IMI's office, no one suggests that Harle accepted the same. And Trytten certainly did not accept the offer because his December 12 draft of a supposed guaranty (Jt.Ex. 24), based on John's letter, was never executed or sent on advice of his fellow officers (M.Ex. 36, R.T. 364).

Nor can it be said that Lancaster, who was in charge in the field, accepted. He proposed Union " guarantee only a separate shipment basis if requested," as noted on Feurt's December 12 memorandum (Jt.Ex. 24). The whole case for a third party beneficiary contract depends upon the slender thread of Moore's testimony, in language he attributed to Page and Morton, and denied by both of them.

Beyond this, Mosher's rights under a so-called third

party beneficiary contract could be no greater than those of the joint venture and any claim on this theory makes Mosher subject to the defenses and inherent equities between Graver and IMI-Ward (*Rest. Contracts*, § 140).

Mosher suggests that perhaps the claimed arrangement was not a third party beneficiary contract after all, but rather a modification of the basic IMI-Ward-Graver subcontract, which would involve "a reduction of the Joint Venture contract price" (M.Br., pp. 82-3). The Morton testimony cited in ostensible support of this still further theory involved a hypothetical question (Pl.Ex. 40, p. 50). Morton was asked whether in view of the United California Bank financing arrangement, Union and the joint venture could modify the joint venture subcontract by reducing the work and the contract price in view of the fact that the monies due for future performance were already assigned to the bank as security for a million dollar line of credit. Morton claimed that this would be possible (Pl.Ex. 40, p. 52) but emphatically denied that the Mosher work had been so deleted from the joint venture contract.

Finally, we again call attention to the Fifth Circuit's decision in *Wolters* (U.Br., pp. 58-9), which holds that even where a third party beneficiary contract exists and has been breached, the proper measure of damage is the loss remaining after deducting amounts recoverable from the party primarily liable. Mosher's failure to discuss this precedent only re-emphasizes its applicability in the present case.

V.

MOSHER FAILS TO DISTINGUISH THE EADS CASE WHICH ESTABLISHES THAT PLAINTIFF WAS ESTOPPED FROM RECOVERING FROM UNION BY REASON OF ITS ACTION IN THE IMI BANKRUPTCY. (Reply to Mosher Brief, pp. 86-93)

Mosher secured its distribution in the IMI bankruptcy by alleging under oath in its proof of claim that its fabrication work was performed for and at the request of IMI individually and that the November 3 purchase orders were IMI purchase orders (U.Ex. E). It did not then affirm, as it does now that the orders were not IMI purchase orders but joint venture obligations or that IMI was not liable individually but solely as a member of IMI-Ward. Nor did Mosher affirm that while the fabricated steel happened to be delivered to IMI, Mosher was not "looking to" IMI for payment and was not "relying on the credit of IMI". Allegations of this sort clearly would have precluded any stock distribution on its claim.

Nevertheless plaintiff contends that its successful claim prosecution does not preclude a recovery against Union and Ward on an inconsistent factual and legal theory because the value of the IMI distribution "has been deducted" and because the claim document declared that it was filed "without prejudice to its [Mosher's] rights against the said Ward Industries Corporation, and the said Union Tank Car Company" (M.Br., pp. 87, 88). This contention shows either a real or assumed misconception of the *Eads* case. Application of the election doctrine in *Eads* did not turn upon whether the plaintiff had placed a self-serving "without prejudice" allegation in his claim or had agreed to deduct the amount received amount received in bankruptcy. It was founded on the fact that in the bankruptcy proceeding *plaintiff successfully asserted his claim to be an individual debtor of the bankrupt while in the subsequent civil action the same debt was asserted as a partnership obligation*.

This is exactly the situation present in the instant case. Mosher obtained a judgment in the bankruptcy court on the theory that its claim was an individual

obligation of IMI. Now Mosher claims that the same indebtedness is not an IMI obligation but a debt of IMI-Ward and Union's Graver Division. As the Tenth Circuit stated, "Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position" (p. 84).

Contrary to Mosher suggestion this result is in no way inconsistent with the Section 16 provisions concerning co-debtors of bankrupts. Had Eads asserted in his bankruptcy claim that Chapman and Merrill were co-debtors on a partnership obligation, Eads perhaps would have received nothing on his claim for want of assets remaining after payment of the individual creditors of the bankrupt. However, under Section 16 his claim against Merrill as an alleged co-debtor would have been unaffected by Chapman's discharge.

Similarly, had Mosher asserted that IMI-Ward and Union were both liable for payment of its work and had sought recovery against IMI only in its capacity as a joint venturer, plaintiff most assuredly would have received no bankruptcy distribution, but its claims against IMI-Ward and Union as alleged co-debtors in this proceeding would not be barred, as they are here, by IMI's discharge. Mosher's position would have been factually and legally consistent throughout.

The instant suit actually presents an even stronger case than *Eads* for application of the election doctrine. Unlike *Eads*, Mosher's claim disclosed that plaintiff was aware of the inconsistency of his position at the time of the bankruptcy proceedings. Mosher's action was deliberate, while Eads' attorney may through ignorance of the actual facts have been inadvertently caught up in the problem. Moreover the debtor in possession in the

IMI bankruptcy sought to stay on allowance and distribution on Mosher's claim pending the determination of this action (M.Ex. 30). With knowledge of its inconsistent claims, Mosher nevertheless opposed the motion and secured an immediate distribution to which it unquestionably was not entitled under its present theories of recovery. This deliberate conduct further underscores the applicability of *Eads*.

At pp. 92-93 Mosher suggests that a "joint venture does not necessarily create the same legal relationship as does a partnership" either under state law or the provisions of the Bankruptcy Act.

Under New York law the same rules govern both partnerships and joint adventures. As was said in *Ross v. Willett* (76 Hun. 211): 'A joint adventure is a limited partnership, not limited in a statutory sense as to liability, but as to its scope and duration, and under our law joint adventures and partnerships are governed by the same rules.' See also *Hutchinson v. Birdsong*, 211 App. Div. 316, 319. *Glenmark, Inc. v. Carity*, 30 Misc. 2d. 1065, at 1069 and *Brown v. Leach*, 189 App. Div. 158, 163. "A joint adventure is subject to exactly the same rules as a technical partnership". *Hardin v. Robinson*, 178 App. Div., 724, 729.

In *Wilcox v. Pratt*, 125 N.Y. 688, the New York Court of Appeals ruled, at 690:

"It is not necessary to inquire whether there was a partnership between the parties in the technical legal sense of that time. Whether it was a partnership or a joint enterprise, the contract is to be enforced and the rights and liabilities of the parties determined upon the same principles as are applied by courts of equity to partnership transactions."

To the same effect, *King v. Barnes*, 109 N.Y. 267, 285.

That the partnership created by a joint venture is subject to the partnership provisions of the Bankruptcy Act is absolutely unquestioned. As long ago as 1877, the District Court in *Thrall v. Crampton*, 23 Fed Cas. 1161, in dealing with a joint venture, ruled "that this was a partnership adventure", and that the primary right of "the partnership creditors to have their debts satisfied out of partnership property before those of separate creditors can be" was unchallenged bankruptcy law. The following decisions, each one of which deals with a joint venture under bankruptcy law, unanimously confirm this rule of law. *In re Taub*, 4 F. 2d 993 (C.A. 2 1924); *In re Kessler & Co.*, 174 Fed 906 (D.C.N.Y. 1909); *Nestor v. Joseph*, 265 Fed. 246 (C.A.7 1920).

An association of individuals carrying on a business for profit, called a "comunidad", *though not technically a partnership under Civil Law or a partnership under Anglo-American common or statutory law*, is nevertheless the entity contemplated by the term "partnership" contained in the Bankruptcy Act, and is subject to the provisions thereof. (*Benitez v. United States*, 141 Fed. (2d) 943, cert. den. 324 U.S. 859.)

VI.

THE COURT ERRED IN DENYING UNION'S COUNTERCLAIM. (Reply to M. Br., pp. 93-4)

This subject has been fully discussed in our opening brief (pp. 66-74) and Mosher has not attempted to dispute that argument by a single citation of law or fact. (M.Br., p. 94)

We believe the record unmistakably shows that Union would never have been sued in this action had IMI-Ward in the first instance not failed and refused to pay Mosher for the fabrication work it required in

order to perform its subcontract with Union's Graver Division. Plaintiff in reality has proceeded against Union as a surety liable for the debt of another. It is unimportant in this connection whether Mosher, or the Court, characterizes Union as a co-debtor or a guarantor. Plaintiff was aware of the contract relation between the defendants and was entitled to but one performance which, as between the two, Ward as a joint venturer should perform. Restatement *Security*, § 82.

The record shows with equal clarity that Union, having already compensated the joint venture, is being called upon to pay twice for the same work. Herbert Dean, a Certified Public Accountant with Arthur Andersen & Co., testified that, on the basis of the joint venture contract, after reflecting the cost of Graver supplied material and the percentage of physical completion on February 2 "Graver had paid the joint venture \$74,785 more than was due to the joint venture" as of the date of IMI's bankruptcy (R.T. 622). Dean further testified that by having to take over and complete the joint venture work on a crash basis, Union expended and additional \$6,344,629.88 by September, 1962 "which had not been repaid by the joint venture" (R.T. 623). His testimony and exhibits have never been challenged in this proceeding.

George Middleton, Graver's assistant missile project manager, testified that the work included in the exhibit prepared to measure physical completion as of February 2 (U.Ex. AA), specifically included Mosher's fabricated steel work up to February 2. He identified the items in the exhibit (R.T. 572). His testimony has never been challenged in this proceeding.

The assigned joint venture invoices in evidence covered items under Section 4 of the subcontract which in turn included the blast lock and levels 2 and 3 fabrica-

tion work delivered by Mosher up to February 2 (U.Ex. III, JJJ, T-Y, R.T. 555, 594). Because of the formula for invoicing on the basis of percentage of completion by site and level, Mosher points out that each item of Mosher fabrication work cannot be specifically identified on the face of these invoices (M.Br., p. 84). However, Wallace Orr testified that all the Mosher work up to bankruptcy was so covered by the assigned invoices (R.T. 859-60). He was examined by plaintiff's counsel (R.T. 860):

“Q. You don't know whether the invoice involved in this particular matter was actually assigned to the bank, do you?

“A. *Yes, all of them were assigned to the bank.*”
(Emphasis supplied.)

With these undisputed facts in the record we respectfully submit that Union established a cause for the equitable relief prayed for in its counterclaim. It was entitled to a decree directing Mosher to first seek satisfaction from Ward as the party primarily liable before resorting to Union. The relief was mandatory under A.R.S. § 12-1642, and completely in accord with the common law principles applied in *Wolters* and discussed in the authorities cited at page 69 of Union's opening brief. Even the district court conceded that the counterclaim stated a proper claim for relief and refused to grant Mosher's motion challenging its legal sufficiency. Yet for some unaccountable reason, the court denied the counterclaim following trial without entering a single fact finding or legal conclusion or even suggesting any reason for so doing.

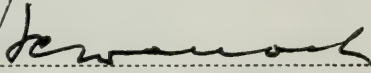
In equity and good conscience, no reason exists for permitting this extraordinary decision to stand.

CONCLUSION

For each of the reasons set forth above and in its opening brief, Union prays that the judgment entered on May 4, 1966 be reversed as to this appellant, or in the event not reversed, then remanded to the district court for appropriate further proceedings on appellant's counterclaim.

Respectfully submitted,

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By 
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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Harold C. Warnock
Of Counsel

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

* * * * *
NO. 21313 ✓

THE STATE OF TEXAS,

Petitioner

V.

FEDERAL POWER COMMISSION,

Respondent

* * * * *

PETITION FOR REVIEW OF ORDERS
OF THE FEDERAL POWER COMMISSION

* * * * *

WAGGONER CARR
Attorney General of Texas

HAWTHORNE PHILLIPS
First Assistant Attorney General

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FILED

OCT 1 1966

WM. B. LUCK CLERK



UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * * * *

NO. _____

THE STATE OF TEXAS,

Petitioner

V.

FEDERAL POWER COMMISSION,

Respondent

* * * * *

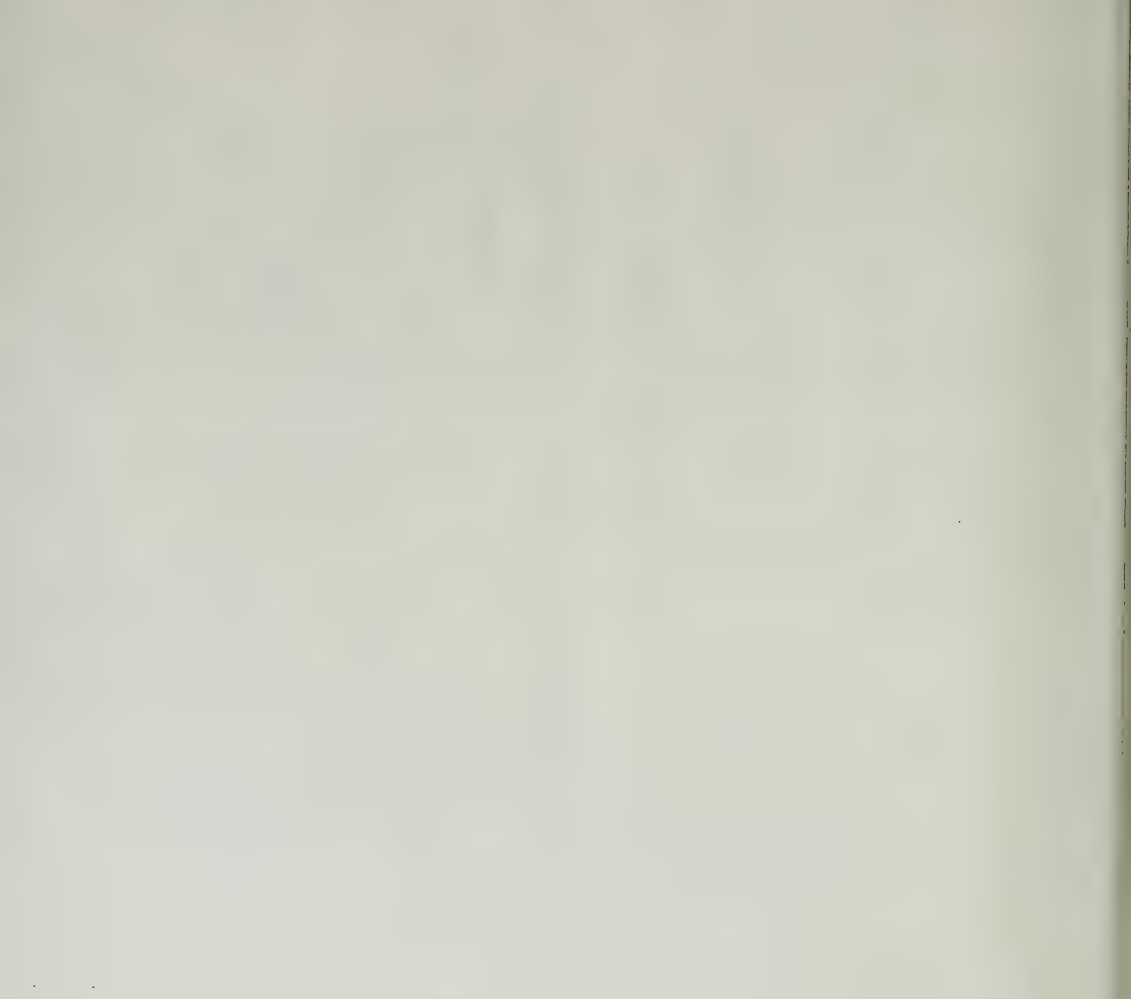
PETITION FOR REVIEW OF ORDER
OF THE FEDERAL POWER COMMISSION

* * * * *

To the United States Court of Appeals for the Ninth Circuit and
the Honorable Judges Thereof:

The State of Texas, acting by and through its duly elected
Attorney General, Waggoner Carr, files this petition pursuant to
Section 19(b) of the Natural Gas Act, (Act),¹ for review of
Federal Power Commission (Commission) Opinion No. 495, and ac-
companying orders thereto, issued June 15, 1966, in F.P.C.
Docket Nos. CP65-213, CP65-214, CP65-215, review of the Com-
mission's Order denying reconsideration, Waiver of the Commis-
sion's Rules and Making Determination of the Question of "Ex-
traordinary Circumstances" issued December 17, 1965 in the same

¹Act of June 21, 1938, c.556, 52 Stat. 821, as amended, 15
U.S.C. Section 717-717w, inclusive.



proceedings, and review of the Commission's Order Denying Application for Rehearing issued August 4, 1966, in the same proceedings. This petition is filed pursuant to Section 19(b) of the Natural Gas Act (52 Stat. 831, as amended by 62 Stat. 991, 63 Stat. 107, 72 Stat. 947; 15 U.S.C. §717(r)), and Rule No. 34 of the Rules of this Court.

In support of this petition the State of Texas shows as follows:

I.

PARTIES

The State of Texas intervened in Dockets Nos. CF65-213, 214, 215 on February 12, 1965.

The Commission is an agency of the United States Government created and existing under the laws of the United States. Its membership is composed of Lee C. White, Chairman; John A. Carver, Jr.; Lawrence J. O'Connor, Jr.; Charles R. Ross; and Carl E. Bagge. These Commissioners are duly appointed, qualified, and acting members of the Commission. The Commission and its members are charged with the responsibility of administering the Natural Gas Act. The principal office of the Commission is at 441 G Street, N.W., Washington, D. C. 20426.

II.

FACTS UPON WHICH JURISDICTION
AND VENUE ARE BASED

1. The opinions and orders of which review is now sought are final orders under Sections 4 and 5 of the Natural Gas Act



by the Federal Power Commission, a duly constituted agency of the United States, having its principal offices as 441 G Street, N.W., Washington, D. C.

2. Petitioner, a party to the proceeding below in Docket Nos. CP65-213, 214, 215 and dockets consolidated therewith, is aggrieved by the Commission opinions and orders issued therein on Dec. 17, 1965, June 15 & Aug. 4, 1966 in that such opinions and orders are unlawful under and violative of the Natural Gas Act, the Administrative Procedure Act of 1946, and the Constitution of the United States. Petitioner filed a timely application for rehearing in accordance with the requirements of Section 19(a) of the Natural Gas Act which has been denied by Commission action on August 4, 1966, under Section 19(a). This Petition is filed within the time permitted and under the procedures established by Section 19(b) of the Natural Gas Act. Jurisdiction, therefore, is in this Court under Section 19(b) of the Natural Gas Act.

3. This Court has jurisdiction of this appeal by virtue of Section 19(b) of the Natural Gas Act since Pacific Gas Transmission Company, a corporation organized and existing under the laws of the State of California, is "located" and has its "principal place of business" in San Francisco, California and therefore within the territorial boundaries of the Ninth Judicial Circuit of the United States, Pacific Gas Transmission Company being the natural gas company to which the subject order and opinion under attack relate, and thus venue also is in this Court.



III.

NATURE OF PROCEEDINGS

The State of Texas intervened in the subject cause for the purposes (1) of opposing the plan and application of Pacific Gas Transmission Company to import from Canada some 200,000,000 cubic feet of natural gas per day for delivery principally to the San Francisco Bay Area and, to some extent, other parts of Northern California, the results of which will create an undependable, unnecessary and inadvisable supply of imported gas in the area of Northern California to the detriment of domestic producers, the national economy, the California consumers, and the public in general, and (2) of suggesting a more desirable source of gas supply for consideration, as an alternative to the supply sought by applicant.

As intervenor herein, the State of Texas did not urge a curtailment of natural gas imports from Canada nor does the State of Texas seek a cessation of timely increases in the volume of Canadian gas brought into the United States; however, the State of Texas firmly advocates a provident policy of utilization of gas from the most dependable and cheapest available source, wherever it may be found, so that, in this instance, Northern California consumers may have a continuous, dependable, and increasing supply of natural gas from a source, not determined merely by provincial or corporate aggrandizement, but rather based on the best source of supply thereof for both Northern California and the Nation.



The State of Texas believes that the Commission has erred in its determinations in Opinion No. 495, and the opinion contravenes the Natural Gas Act and the well established case law of the United States.

IV.

GROUNDNS UPON WHICH RELIEF IS SOUGHT

As set forth hereinabove and in the State of Texas' application for rehearing² the State of Texas contends that the Commission committed the following errors in Opinion No. 495:

1. The Commission erred in ignoring the record evidence which establishes the inadequacy of the supply of natural gas upon which the applicant would depend.

2. The Commission erred in allowing contracts with price escalation clauses to be used.

3. The Commission erred in refusing to admit relevant evidence of the State of Texas into the record showing a presently available, more economic and desirable, alternate supply of natural gas produced in Texas.

4. The Commission's decision was reached without sufficient regard to or full consideration of a presently available, more economic and desirable, alternate supply of natural

²A copy of the application for rehearing is annexed hereto as Appendix A which is hereby incorporated herein. Every allegation and contention there made is renewed and repeated as fully as though set forth herein.



gas produced in Texas.

5. The Commission erred in placing unjustified emphasis on the original authorization of the subject project.

Petitioner by summarizing the errors of the Commission does not limit the assignment of error to the ones listed; on the contrary, as heretofore stated, every allegation and contention made in its application for rehearing is renewed and repeated as fully as set forth above.

V.

AGGRIEVEMENT AND RELIEF PRAYED

The State of Texas has been aggrieved by Opinion No. 495 for the reasons set out above. Therefore, for all the foregoing reasons Petitioner prays:

- (a) That the Clerk of this Court serve a copy of the petition upon the Respondent, Federal Power Commission at its official address, 441 G Street, N.W., Washington, D. C. 20426, in accordance with the provisions of Section 19(b) of the Natural Gas Act;
- (b) That this Court direct the Commission, in conformity with Section 19(b) of the Natural Gas Act (15 U.S.C. Sec.717r(b)), to certify and file with the Clerk of this



Court the official transcript of the record in the proceedings here sought to be reviewed;

(c) That the Court review the Commission's Opinion No. 495 issued June 15, 1966, and its Orders of December 17, 1965, June 15, 1966, and August 4, 1966, respectively, and upon such review, reverse and set aside this opinion and orders with regard to the errors specified in this Petition and

(d) That the Court exercise jurisdiction over the parties and subject matter of this petition and grant to Petitioner such other and further relief as the rights and equities of the cause may render appropriate in the premises.

Respectfully submitted,

THE STATE OF TEXAS

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First Assistant Attorney General

WAGGONER CARR
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Executive Assistant

J. ARTHUR SANDLIN
Assistant Attorney General

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C. Daniel Jones, Jr.
C. DANIEL JONES, JR.

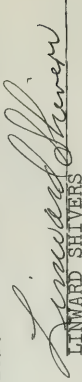
Assistant Attorney General
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THE STATE OF TEXAS }
COUNTY OF TRAVIS }

LINWARD SHIVERS, being first duly sworn according to law deposes and says that he is an Assistant Attorney General for the State of Texas; that as such he has signed the foregoing document; that he is authorized so to do; that he has read said document and is familiar with the contents thereof; and, that the matters and things therein set forth are true and correct to the best of his knowledge, information and belief.


LINWARD SHIVERS

28th day of September, 1966. SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public, this

(SEAL)


VIRGINIA OWENS
Notary Public in and for
Travis County, Texas

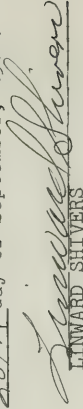
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing
"Petition for Review of Orders of the Federal Power Commission"
upon the following party:

Howard E. Wahrenbrock, Solicitor
Federal Power Commission
441 G Street, N.W.
Washington, D. C. 20426

and all parties to the proceeding.

Dated at Austin, Texas this 28th day of September, 1966.


LINWARD SHIVERS



APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matters of

Docket Nos. CP65-213
CP65-214
CP65-215

PACIFIC GAS TRANSMISSION
COMPANY

APPLICATION OF THE STATE OF TEXAS
FOR REHEARING OF OPINION NO. 495
AND THE COMMISSION'S ORDERS OF JUNE 15, 1966

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Attorney General of Texas

HAWTHORNE PHILLIPS
First Assistant Attorney General

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matters of

Docket Nos. CP65-213
CP65-214
CP65-215

PACIFIC GAS TRANSMISSION
COMPANY

APPLICATION OF THE STATE OF TEXAS
FOR REHEARING OF OPINION NO. 495
AND THE COMMISSION'S ORDERS OF JUNE 15, 1966

Pursuant to the provisions of Section 19(a) of the Natural Gas Act of 1938, 52 Stat. 832, 15 U.S.C. § 717 (r) (Act), the State of Texas hereby files this application for rehearing of the Commission's orders of June 15, 1966, Opinion No. 495 in the above styled proceeding, hereinafter referred to as Opinion No. 495. As required by Section 19(a), supra, The State of Texas submits the following grounds in support of its application.

PRELIMINARY STATEMENT

The State of Texas intervened in the above styled proceeding by filing its notice of intervention dated February 12, 1965.

As pointed out in the initial brief filed herein, The State of Texas has intervened in the captioned proceedings for the purposes (1) of opposing the plan and application of Pacific Gas Transmission Company to import from Canada some 200,000,000 cubic feet of natural gas per day for delivery principally to the San Francisco Bay Area and, to some extent, other parts of Northern California, the results of which will



create an undependable, unnecessary and inadvisable supply of imported gas in the area of Northern California to the detriment of domestic producers, the national economy, the California consumers, and the public in general, and (2) of suggesting a more desirable source of gas supply for consideration, as an alternative to the supply sought by applicant.

As intervenor herein, the State of Texas did not urge a curtailment of natural gas imports from Canada nor does the State of Texas seek a cessation of timely increases in the volume of Canadian gas brought into the United States; however, the State of Texas firmly advocates a provident policy of utilization of gas from the most dependable and cheapest available source, wherever it may be found, so that, in this instance, Northern California consumers may have a continuous, dependable, and increasing supply of natural gas from a source, not determined merely by provincial or corporate aggrandizement, but rather based on the best source of supply thereof for both Northern California and the Nation.

The State of Texas believes that the Commission has erred in certain of its determinations in Opinion No. 495, and as a specification of such error contained in said Opinion No. 495, the State of Texas alleges and states as follows:

SPECIFICATION OF ERROR

I.



THE COMMISSION ERRED IN IGNORING THE RECORD EVIDENCE WHICH ESTABLISHES THE INADEQUACY OF THE SUPPLY OF NATURAL GAS UPON WHICH THE APPLICANT WOULD DEPEND.

In Opinion 495 the Commission has disregarded (1) the ultimate limits of the volume of gas authorized for export by foreign governmental authority (which was not developed in this hearing except in the form of a conclusion), (2) the physical insufficiency of the supply itself, (3) the possible result of future diversion of Canadian gas by the Canadian government.

II.

THE COMMISSION ERRED IN ALLOWING CONTRACTS WITH PRICE ESCALATION CLAUSES TO BE USED.

The uncertainty of future prices of imported Canadian gas sought by applicant was largely disregarded by the Commission. The uncertainty of price of such Canadian gas is abundantly evident in the record.

A double standard will emerge for pricing of gas sold in the United States if the Commission allows its order to stand. While the price of domestic gas is firmly set by governmental control and supervision, the price of Canadian gas imported into this country is free to fluctuate and thereby increase in accordance with various re-negotiation provisions and weighted average clauses of gas purchase contracts and under so-called "postage stamp" policies.

Certainly this is rank discrimination against the domestic producer.



THE COMMISSION'S DECISION WAS REACHED WITHOUT SUFFICIENT
REGARD TO OR FULL CONSIDERATION OF A PRESENTLY AVAILABLE, AL-
TERNATE SUPPLY OF NATURAL GAS PRODUCED IN TEXAS.

The State of Texas continuously undertook to offer testimony from two witnesses evidencing a presently available supply of gas produced in Texas and a means of delivering it to the California border as an alternative and more economic and desirable source than the foreign source sought by Applicant; however, said testimony was never permitted to be placed in the record for consideration in its entirety, and regretably the State of Texas was, with reference thereto, limited to mere Offers of Proof.

During the hearing herein, the State of Texas even undertook to file a motion before the Commission requesting a ruling therefrom that subpoenas duces tecum should issue for its witnesses and that the Presiding Examiner's ruling rejecting such testimony be overruled. In the first place, long after such motion had been filed, it was "rejected" apparently by the "Secretary of the Federal Power Commission," who apparently took upon himself to construe the nature of such motion, although said motion was of course directed to the Commission itself under the Commission's Rules of Practice and Procedure. Faced with such action by the Secretary, the State of Texas again sought to have its highly relevant and important testimony described hereinbelow placed in evidence by filing with the Commission its "Application For Reconsideration and For Waiver Of the Commission's Rules, If Necessary, and Request For the Commission's Determination



of the Question of 'Extraordinary Circumstances'". Said "Application and Request" was denied. Therefore, never has the State of Texas been permitted to place its said testimony in the record herein for full consideration nor to fully develop its position, but, to the contrary, has merely been granted Offers of Proof, which cannot help but be by their nature an ineffectual means of preparing a record.

In that connection, the testimony, to which said "Offers of Proof" are directed, would evidence an alternate, dependable supply of gas from Texas available to Pacific Gas & Electric Company in a sufficient volume to fulfill P.G. & E.'s requirement for gas sought to be supplied by Applicant from Canadian sources and at a lower price at the California border than the price of the Canadian gas sought under the pending application.

The Presiding Examiner, in preparing and rendering the Initial Decision, refused to give any consideration whatsoever to the alternate supply of gas from Texas because no competitive application was filed by El Paso Natural Gas Company, through the lines of which such Texas gas would have to be supplied to the California market (Initial Decision, pages 16-17); however, although counsel for El Paso Natural Gas Company indicated that the company had no "excess capacity" in its lines at the present time by virtue of which it could make deliveries and had filed no competing application in the captioned proceedings, El Paso Natural Gas Company did in fact intervene as a party herein and has maintained a completely neutral position in this proceeding and has never objected in any manner to the possibility of carrying additional gas to



the California market. Furthermore, the terms, "excess capacity", and "unfilled capacity", have never been defined in this hearing, and no determination has been made herein as to the context in which the terms were used.

Moreover, in the original application in the Gulf Pacific Case (Docket No. CP 64-76), El Paso Natural Gas Company showed therein that it could deliver an additional 250,000 Mcf per day to the California border by reinforcing its existing facilities from Texas, and in a first amended application, alternatively showed therein that it could deliver 575,000 Mcf per day to the California border via a proposed new pipeline from New Mexico (known as the "Chaco-Needles Line"), as well as the aforementioned 250,000 Mcf per day by reinforcement of existing facilities (Tr. 426-427).

Furthermore, Mr. Barry Hunsaker, Chief Engineer and vice president of El Paso Natural Gas Company, testified that, at the request of the Southern California distributor companies, he had prepared exhibits demonstrating another alternative, by virtue of which El Paso Natural Gas Company could deliver to the California border 250,000 Mcf per day heretofore mentioned plus an additional 325,000 Mcf per day making a total 575,000 Mcf per day merely by reinforcing its existing pipelines (without constructing the "Chaco-Needles Line") (Tr. 413-415). Since El Paso Natural Gas Company did not make application to deliver this additional 325,000 Mcf per day through its existing pipelines, this alternative is as available for consideration by the Commission today as it was when the said testimony and exhibits of Mr. Barry Hunsaker were prepared.



Not only are the said testimony and exhibits of Mr. Barry Hunsaker highly relevant and material in the matters here under consideration, but also their admission into the record herein as evidence, as requested by the State of Texas, is in keeping with the holdings in City of Pittsburg vs. Federal Power Commission, 237 Fed. 2nd 741 (D.C. Cir. 1956) and the "Rock Springs" case, 30 FPC 77 (1963), that the Commission should consider alternative means to determine whether a particular proposal would serve the public convenience and necessity, regardless of whether a formal application or competitive application is made with reference to such proposal.

In the abovementioned City of Pittsburg Case, the District of Columbia Circuit Court of Appeals set forth the following rule:

"The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity. That the Commission has no authority to command the alternative does not mean that it cannot reject the (original) proposal." City of Pittsburg vs. Federal Power Commission, 237 Fed 2nd 741 (D.C. Cir. 1956).

Furthermore, such a rule has been subsequently followed by the United States Court of Appeals for the Second Circuit, as evidenced by its opinion declaring that a project under consideration by the Commission must be compared with any alternatives that are available and its following statements from such opinion:

"...the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission."



"The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts." Scenic Hudson Preservation Conference et al vs. Federal Power Commission, 354 Fed. 2nd 608 (Second Cir. 1965); Also see Michigan Consolidated Gas Co. vs. Federal Power Commission, 283 Fed. 2nd 204 (D.C. Cir., cert. denied, 364 U.S. 913, 1960).

In addition, as reflected by the present record, Applicant's own witness testified that the incremental price of such available "Texas" gas at the California border (Topock) is approximately 22 cents per Mcf, which is a cheaper price than even the original incremental price of Applicant's proposed imported gas at the California border (Tr. 1219-1222).

Evidence has been placed in this record that El Paso Natural Gas Company can furnish desirable natural gas to the Northern California market at a lower California border price than that of the foreign gas proposed by Applicant. The State of Texas should be permitted to make a showing that there is in fact a presently existing, alternate supply of natural gas available to the Northern California market, which is more desirable and may be produced at a lower price than the imported gas herein proposed. Such a showing of evidence should be permitted in this hearing, especially in the light of the Initial Decision in the Gulf Pacific case and especially since the testimony proposed by the State of Texas (together with the cross-examination in connection therewith) may reflect that El Paso Natural Gas Company can presently supply Northern California with such available gas and is desirous of so serving the Northern California market. As is stated by the Court in the Hudson River Case:



"If the Commission is properly to discharge its duty. . .; the record on which it bases its determination must be complete. The petitioners and the public at large have the right to demand this completeness." (Emphasis added) Scenic Hudson Preservation Conference et al vs. Federal Power Commission, 354 Fed. 2nd 608 (Second Cir., 1965).

The State of Texas further submits that, if the witnesses it sought to call had been permitted to testify (and to be available for cross-examination), the record in these proceedings would have been supported by overwhelming evidence confirming this State's position as a party intervenor herein and substantiating the record established herein that a dependable natural gas supply for the Northern California market is presently available in Texas, which can be transported to the California border through existing facilities and can be sold there at a firm price and a price lower than the relatively unreliable foreign gas proposed for importation by Applicant.

IV.

THE COMMISSION ERRED IN PLACING UNJUSTIFIED EMPHASIS ON THE ORIGINAL AUTHORIZATION OF THE SUBJECT PROJECT.

In the original proceeding in which authorization for a 36-inch pipeline was granted by the "various regulatory agencies," no objection was made to the oversized pipeline as proposed by Applicant, and therefore, the adversary system was not at such time evoked, and an airing of all facts - favorable and unfavorable - which opposition at a hearing would elicit, was never fully made. A question exists as to whether such oversized pipeline would have been authorized on August 5, 1960, if the application and the plan of Applicant therein had in fact been opposed.



Nevertheless, no more can be assumed than that the Applicant indicated in said original hearing "that future authorizations would be sought to import additional volumes of natural gas to utilize the full capacity of the line." Surely, it cannot be assumed that the Federal Power Commission, by granting the original application, thereby concluded that all future applications by Pacific Gas Transmission Company regarding additional utilization of such pipeline would be granted at any and all times without question.

The State of Texas says that such assumption was never intended; that this is not the time to permit additional importation of gas into the Northern California area; and that any economic advantage of a presently oversized pipeline in this instance is far outweighed by the disadvantages of (1) inadequacy of supply, (2) uncertainty of prices (3) unnecessary dependency on foreign gas, and (4) relatively high costs when compared with an available, alternate, domestic supply, all of which disadvantages, as discussed hereinabove, are inherent in the proposal of Applicant in the captioned proceedings.

WHEREFORE, the State of Texas respectfully requests that the Commission grant a rehearing and oral arguments in these proceedings so that a full consideration can be given to the alternative source of supply of gas, and upon rehearing deny the pending application in full.

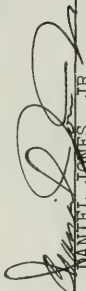
THE STATE OF TEXAS


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ATTORNEY GENERAL OF TEXAS

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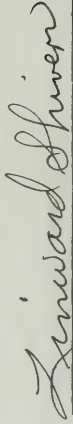

LINWARD SHIVERS
Assistant Attorney General

Box "R", Capitol Station
Austin 11, Texas 78711

VERIFICATION

STATE OF TEXAS }
COUNTY OF TRAVIS }

Linward Shivers, being first duly sworn, deposes and says that he is an assistant attorney general for the State of Texas, that as such he has signed the foregoing "Application for Rehearing;" that he is authorized so to do; that he has read said Application and is familiar with the contents thereof, and that the matters and things therein set forth are true and correct to the best of his knowledge, information and belief.


LINWARD SHIVERS

SWORN TO AND SUBSCRIBED BEFORE ME,
this 6th day of July, 1966.

David Longoria
Notary Public in and for
Travis County, TEXAS

(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties appearing on the Service List of the Secretary of the Commission in these proceedings, in accordance with the requirements of Par. 1.17 of the Rules of Practice and Procedure.

Dated at Austin, Texas, this 6th day of July, 1966.

Linward Shivers
LINWARD SHIVERS

20014 /

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NO.....

**TEXAS INDEPENDENT PRODUCERS & ROYALTY
OWNERS ASSOCIATION, WEST CENTRAL TEXAS
OIL AND GAS ASSOCIATION, AND PERMIAN
BASIN PETROLEUM ASSOCIATION,**
Petitioners

v.

FEDERAL POWER COMMISSION
Respondent

**JOINT AND SEVERAL PETITION OF
TEXAS INDEPENDENT PRODUCERS &
ROYALTY OWNERS ASSOCIATION
WEST CENTRAL TEXAS OIL AND GAS
ASSOCIATION
AND PERMIAN BASIN PETROLEUM
ASSOCIATION,
FOR REVIEW OF OPINION AND ORDERS
OF THE FEDERAL POWER COMMISSION**

FILED

1966 - 3 1966

JOHN DAVENPORT
902 International Life Building
Austin, Texas
Attorney for above Petitioners

WM. B. LUCK, CLERK



21314

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NO.....

TEXAS INDEPENDENT PRODUCERS & ROYALTY
OWNERS ASSOCIATION, WEST CENTRAL TEXAS
OIL AND GAS ASSOCIATION, AND PERMIAN
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JOINT AND SEVERAL PETITION OF
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ASSOCIATION,
FOR REVIEW OF OPINION AND ORDERS
OF THE FEDERAL POWER COMMISSION

FILED

OCT - 3 1966

WM. B. LUCK, CLERK

JOHN DAVENPORT
902 International Life Building
Austin, Texas
Attorney for above Petitioners



**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NO.....

TEXAS INDEPENDENT PRODUCERS & ROYALTY
OWNERS ASSOCIATION, WEST CENTRAL TEXAS
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WEST CENTRAL TEXAS OIL AND GAS
ASSOCIATION
AND PERMIAN BASIN PETROLEUM
ASSOCIATION,
FOR REVIEW OF OPINION AND ORDERS
OF THE FEDERAL POWER COMMISSION

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

COME NOW Texas Independent Producers & Royalty Owners Association, West Central Texas Oil and Gas Association, and Permian Basin Petroleum Association (Petitioners) and jointly and severally petition this Honorable Court for review of Federal Power Commission (Commission) Opinion No. 495, and accompanying orders thereto, issued June 15, 1966, in F.P.C. Docket Nos. CP65-213, CP65-214, and CP65-215, review of the Commission Order Denying Reconsideration, Waiver of the Commission's Rules and Making Determination of the Question of "Extraordinary Circumstances" issued December 17, 1965 in the same proceedings, and review of the Commission's Order Denying Application for Rehearing issued August 4, 1966, in the same proceedings. This petition is filed pursuant to Section 19 (b) of the Natural Gas Act (52 Stat. 831, as amended by 62 Stat. 991, 63 Stat. 107, 72 Stat. 947; 15 U.S.C. §717(r)), and Rule No. 34 of the Rules of this Court.

I.

**STATEMENT OF THE NATURE OF THE PROCEEDING
OF WHICH REVIEW IS SOUGHT**

1. By the Opinions and Orders of which review is here sought, the Commission issued a certificate authorizing the construction of additional facilities for and the importation of 100 million cubic feet per day of Canadian natural gas commencing on November 1, 1966, and an additional 100 million cubic feet per day commencing on November 1, 1967, for transportation and sale by Pacific Gas Transmission to the Pacific

Gas and Electric Company for resale in Northern California. The Opinions and Orders were issued purportedly under the authorization of Section (c) and (e) of Section 7 of the Natural Gas Act, (52 Stat. 825; 15 U.S.C. Sect. §717 (f)) and the authorized importation constitutes an addition to an original (1960) authorization to Pacific Gas Transmission to deliver an average of 415 million cubic feet of gas per day to the Pacific Gas and Electric Company.

2. Petitioners are trade associations with a combined membership of approximately 7500 independent producers and royalty owners of crude oil and natural gas. Since many hundreds of members of these associations engage in sales of natural gas subject to the jurisdiction of the Commission, under the Natural Gas Act, and since most of the jurisdictional natural gas in West Texas is sold into the California markets, Petitioners sought to intervene in the proceeding below; and having demonstrated to the Commission below their interest in these proceedings, were granted leave to intervene by the Commission Order dated May 25, 1965.

3. For purposes of this petition the most pertinent procedural events may be summarized as follows:

a. A pre-hearing conference was held on July 22, 1965, pursuant to the amended order of the Commission issued on June 18, 1965, (30 F.R. 8286). The hearing itself began on September 15, 1965, and concluded on September 29, 1965.

b. On the opening day of the hearing the hearing examiner sustained a Motion to Exclude Testimony by reference of Keith C. McKinney and Barry Hunsaker. Petitioners and others sought the issuance of subpoenas duces tecum for McKinney and Hun-

saker, but the presiding examiner refused to issue these subpoenas. Petitioners and others then sought to prosecute an appeal to the Commission seeking issuance of subpoenas for these witnesses, but this appeal was denied by the Commission in its Order issued December 17, 1965. At the suggestion of the presiding examiner the originally proffered testimony of these witnesses was submitted as an offer of proof, but Petitioners emphasized that this offer of proof was not a substitute for the live testimony of these witnesses, who were not available to Petitioners and other parties except by subpoena.

c. The hearing examiner issued his initial decision on February 17, 1966, approving issuance of a certificate authorizing transportation and sale of additional quantities of gas by Pacific Gas Transmission Company to Pacific Gas and Electric Company and authorizing importation of this gas from Canada.

d. Exceptions to the initial decision were filed by these Petitioners and others on March 17, 1966.

e. The Commission issued its Opinion No. 495 dated June 15, 1966, authorizing the importation of the additional quantities of gas as shown in the Pacific Gas Transmission application.

II.

FACTS UPON WHICH JURISDICTION AND VENUE ARE BASED

The Texas Independent Producers & Royalty Owners Association, West Central Texas Oil and Gas Association, and Permian Basin Petroleum Association are each non-profit corporations created under the laws of

the State of Texas. Members of Petitioners are engaged in the sale of natural gas in interstate commerce of natural gas for resale in Northern California. The Commission is an agency of the United States Government created and existing under the laws of the United States. Its membership is composed of Lee C. White, Chairman; L. J. O'Connor, Jr.; Charles R. Ross; Carl E. Bagge, and John Carver, Jr. These Commissioners are duly appointed, qualified, and acting members of the Commission. The Commission and its members are charged with the responsibility of administering the Natural Gas Act, the provisions of which apply to the sale in interstate commerce of natural gas for resale. The principal office of the Commission is at 441 G Street, N.W., Washington, D. C. 20426.

Petitioners are intervenors in the proceedings below in Docket Nos. CP65-213, CP65-214, and CP65-215, and are aggrieved by Commission Opinion No. 495 and the Orders issued on December 17, 1965, June 15, 1966, and August 4, 1966, in that such Opinion and Orders are unlawful under, and violative of the Natural Gas Act, the Administrative Procedure Act of 1964, and the Constitution of the United States.

This petition for review is filed under Section 19(b) of the Act. Pursuant to Section 19(a) of the Act, Petitioners filed their application for rehearing on July 8, 1966. By Order issued August 4, 1966, the Commission denied Petitioners' application for rehearing.

This petition for review is filed within sixty days of the date Petitioners' application was denied, in accordance with the provisions of Section 19(b) of the Act.

The first petition for review from Opinion No. 495 was filed in this Court by the California Gas Producers

Association, et al., and pursuant to the provision of 28 U.S.C. § 2112, all subsequently filed petitions will be consolidated before this Court for review. Pacific Gas Transmission Company, applicant below, has its principal place of business in San Francisco, California. Venue, therefore, is in this Court.

III.

GROUND'S UPON WHICH RELIEF IS SOUGHT

These Petitioners throughout these proceedings sought to present evidence relating to a cheaper, more dependable, supply of natural gas than that proposed to be imported under the Pacific Gas Transmission application. The hearing examiner struck the evidence of Arlan Edgar, witness for the Permian Basin Petroleum Association and Bob R. Harris, witness for the State of Texas, both of whom would have shown the availability of ample gas supplies from the West Texas area. The testimony of witnesses McKinney and Hunsaker was excluded by the hearing examiner and specifically affirmed by the Commission in its Order of December 17, 1965. This excluded testimony would have established that large new additional supplies of gas were (and are) available from West Texas-New Mexico wells and can be delivered more cheaply than the Pacific Gas Transmission gas to the Northern California area.

This denial of the admission of this evidence, clearly relevant to this hearing and vital to support Petitioners' position, was a denial of due process guaranteed by the Constitution of the United States, and an abdication by the Commission of its statutory responsibilities.

As set forth hereinabove and in the Petitioners' application for rehearing, these Petitioners contend that the Commission committed the following errors in Opinion No. 495 and the Orders in this proceeding:

1. The Commission failed to meet its statutory responsibility to determine the best, cheapest, and most dependable source of natural gas and thereby to protect the interest of the public.

2. The Commission's denial of the issuance of subpoenas and the admission of testimony by reference is unlawful under the Natural Gas Act, the Administrative Procedures Act, and the Constitution of the United States.

3. The Commission erroneously found that a market exists for the proposed additional sales by Pacific Gas Transmission to Pacific Gas and Electric, contrary to the evidence of record.

4. The Commission erred in granting the application for certification, based primarily on the utilization of the present Pacific Gas Transmission pipeline facilities to their fullest capacity.

Petitioners by summarizing the errors of the Commission do not limit the assignment of error to the ones listed; on the contrary, as heretofore stated, every allegation and contention made in the application for rehearing is renewed and repeated as fully as if set forth above.

IV.

PRAYER FOR RELIEF

WHEREFORE, for all of the foregoing reasons Petitioners pray:

- (a) That the Clerk of the Court serve a copy of this petition upon the Respondent, Federal Power Commission at its official address, 441 G Street, N.W., Washington, D. C. 20426, in accordance with the provisions of Section 19(b) of the Natural Gas Act;

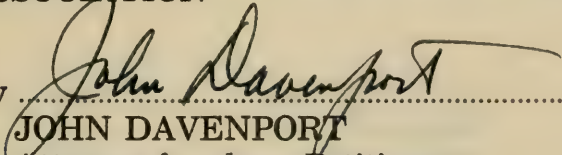
- (b) That this Court direct the Commission to file with the Clerk of this Court the official transcript of the record in the proceedings here sought to be reviewed;
- (c) That the Court review the Commission's Opinion No. 495 issued June 15, 1966, and its Orders of December 17, 1965, June 15, 1966, and August 4, 1966, respectively, and upon such review, reverse and set aside this opinion and orders with regard to the errors specified in this Petition and
- (d) That the Court exercise jurisdiction over the parties and subject matter of this Petition and afford Petitioners such other and further relief as the law and circumstances require.

Respectfully submitted,

TEXAS INDEPENDENT PRODUCERS &
ROYALTY OWNERS ASSOCIATION

WEST CENTRAL TEXAS OIL
AND GAS ASSOCIATION

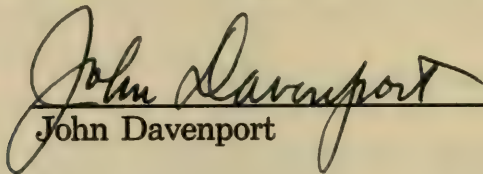
PERMIAN BASIN PETROLEUM
ASSOCIATION

By .....
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Austin, Texas

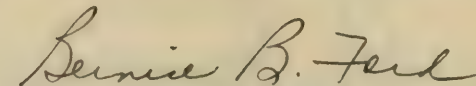
September 29, 1966

THE STATE OF TEXAS
COUNTY OF TRAVIS

JOHN DAVENPORT, being first duly sworn according to law deposes and says that he is an Attorney for Texas Independent Producers & Royalty Owners Association, West Central Texas Oil and Gas Association, and Permian Basin Petroleum Association; that as such he has signed the foregoing document; that he is authorized so to do; that he has read said document and is familiar with the contents thereof; and, that the matters and things therein set forth are true and correct to the best of his knowledge, information and belief.


John Davenport

SUBSCRIBED AND SWORN TO BEFORE ME,
a Notary Public, this 29th day of September, 1966.



Bernice B. Ford
Notary Public in and for Travis
County, Texas

My commission expires June 1, 1967.

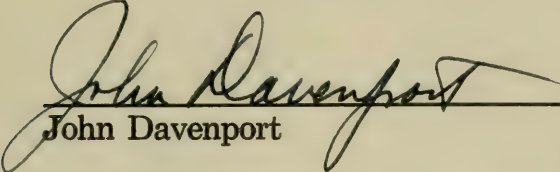
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing "Joint and Several Petition for Review of Opinion and Orders of the Federal Power Commission" upon the following party:

Joseph H. Gutride, Secretary
Federal Power Commission
441 G Street, N.W.
Washington, D. C. 20426

and all parties to the proceedings.

Dated at Austin, this 29th day of September, 1966.



John Davenport

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 21314

TEXAS INDEPENDENT PRODUCERS &
ROYALTY OWNERS ASSOCIATION, et al,
Petitioners

v.

FEDERAL POWER COMMISSION
Respondent

JOINT AND SEVERAL BRIEF OF PETITIONERS
TEXAS INDEPENDENT PRODUCERS &
ROYALTY OWNERS ASSOCIATION,
WEST CENTRAL TEXAS OIL AND GAS
ASSOCIATION
AND PERMIAN BASIN PETROLEUM
ASSOCIATION

FILED

DEC 8 1966

WM. B. LUCK, JR.
JOHN DAVENPORT
902 International Life Building
Austin, Texas 78701
Attorney for above Petitioners

December 12, 1966

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 21314
TEXAS INDEPENDENT PRODUCERS &
ROYALTY OWNERS ASSOCIATION, et al,
Petitioners

v.

FEDERAL POWER COMMISSION
Respondent

JOINT AND SEVERAL BRIEF OF PETITIONERS
TEXAS INDEPENDENT PRODUCERS &
ROYALTY OWNERS ASSOCIATION,
WEST CENTRAL TEXAS OIL AND GAS
ASSOCIATION
AND PERMIAN BASIN PETROLEUM
ASSOCIATION

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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

STATEMENT OF JURISDICTION

Petitioners herein have previously filed a Petition for Review of Federal Power Commission (Commission) Opinion No. 495, and accompanying orders thereto, issued June 15, 1966, in F.P.C. Docket Nos. CP65-213, CP65-214, and CP65-215, review of the Commission Order Denying Reconsideration, Waiver of the Commission's Rules and Making Determination of the Question of "Extraordinary Circumstances" issued December 17, 1965 in the same proceedings, and review of the Commission's Order Denying Application for Rehearing issued August 4, 1966, in the same proceedings under Section 19(b) of the Natural Gas Act. (Title 15 U.S.C. 717-717w) In accordance with the provisions of that Act a review of this order is proper in this Court, because it is a "circuit wherein the natural gas company to which the order relates is located or has its principal place of business." Petitioners timely filed an application for rehearing of Opinion 495 and accompanying orders by the Federal Power Commission, and after denial thereof, a Petition for Review was filed in this Court within sixty days of the date Petitioners' application was denied, in accordance with the provisions of Section 19 (b) of the Act.

I.

STATEMENT OF THE CASE

By the Opinions and Orders of which review is here sought, the Federal Power Commission issued a certificate authorizing the construction of additional facilities and the importation of 100 million cubic feet per day of Canadian

natural gas commencing on November 1, 1966, and an additional 100 million cubic feet per day commencing on November 1, 1967, for transportation and sale by Pacific Gas Transmission Company (PGT) to the Pacific Gas and Electric Company (PG&E) for resale in Northern California. The Opinions and Orders were issued purportedly under the authorization of Subsections (c) and (e) of Section 7 of the Natural Gas Act, (52 Stat. 825; 15 U.S.C. Sect. §717 (f)), and the authorized importation constitutes an addition to an original (1960) authorization of PGT to deliver 415 million cubic feet of Canadian natural gas per day to PG&E. (24 FPC 134, August 5, 1960)

II.

Petitioners are trade associations in Texas with a combined membership of approximately 7500 independent producers and royalty owners of crude oil and natural gas. Since many hundreds of members of these associations in West Texas engage in sales of natural gas subject to the jurisdiction of the Commission, under the Natural Gas Act, and since most of the jurisdictional natural gas in West Texas is sold into the California markets, Petitioners sought to intervene in the proceeding below; and having demonstrated to the Commission below their interest in these proceedings, were granted leave to intervene by the Commission Order dated May 25, 1965. (Tr. 4374) These Petitioners participated actively in all proceedings below before the hearing examiner. (Tr. 132-1769)

III.

A pre-hearing conference was held on July 22, 1965, (Tr. 1) pursuant to the amended order of the Commission issued on June 18, 1965, (30 F.R. 8286). The hearing it-

self began on September 15, 1965, and concluded on September 29, 1965. (Tr. 132-1769)

IV.

On the opening day of the hearing, the hearing examiner sustained a Motion to Exclude Testimony of Bob R. Harris, an employee of the Texas Railroad Commission, (Tr. 136) and Arlan Edgar (Tr. 137), both of which witnesses would have presented evidence on availability of supplies of natural gas from portions of West Texas which are connected by existing interstate pipeline to the proposed California markets.

V.

The hearing examiner also sustained a Motion to Exclude Testimony by reference and supporting exhibits of Barry Hunsaker, an employee of El Paso Natural Gas Company. (Tr. 140)

VI.

The State of Texas, supported by these producer associations then sought issuance of a subpoena duces tecum for the witness Barry Hunsaker, but this request for a subpoena was denied by the hearing examiner. (Tr. 430) The hearing examiner denied the application for a subpoena duces tecum for this witness, even though informed by Texas and other parties that this witness was essential to establish their contention that the gas available in Texas could be more cheaply and dependably delivered in California than the gas covered by PGT's application. (Tr. 417) The State of Texas repeatedly emphasized that additional information was needed from Mr. Hunsaker, and that since he is not a witness nor an employee of the State of Texas

but General Manager of the pipeline division of El Paso Natural Gas Company, a subpoena would be required to obtain his essential testimony. (Tr. 413)

VII.

The State of Texas, joined by these Petitioners, then sought to appeal the refusal of the hearing examiner to issue a subpoena for witness Hunsaker to the Commission, but the Commission Secretary, after accepting the filings (Tr. 4631) later returned them with his (the *Secretary's*) ruling that they did not "recite pressing reasons for review of the Examiner's ruling by the Commission." (Tr. 4733) On Motion for Reconsideration (Tr. 4743) the Commission denied this appeal in its order issued December 17, 1965. (Tr. 4890)

VIII.

The hearing examiner issued his initial decision on September 17, 1966 approving issuance of a certificate authorizing the transportation and sale of additional quantities of Canadian natural gas from PGT to PG&E and authorizing importation of this gas from Canada. (Tr. 4902-4929)

IX.

Exceptions to the initial decision were filed by these Petitioners and others on March 17, 1966. (Tr. 4948-4963)

X.

The Commission issued its Opinion No. 495 dated June 15, 1966 authorizing the importation of additional quantities of gas requested in the PGT application. (TR 5257-5263)

XI.

These Petitioners filed applications for Rehearing of Opinion No. 495 and the Commission's Orders on July 11, 1966. (Tr. 5278-5284)

PRELIMINARY STATEMENT

Throughout these proceedings, the State of Texas (Petitioner in Cause No. 21313); the Texas producer associations (Petitioners herein); and the California producing group (Petitioners in No. 21310) have been allied in attempting to present evidence that would establish

- (1) There is no present need in Northern California for the huge volumes of gas sought by the PGT application, and
- (2) Alternative sources could supply the existing need of Northern California consumers more dependably and at a cheaper price.

To avoid burdening the Court with duplicating arguments, these Petitioners hereby adopt the briefs herein submitted by the State of Texas in Cause No. 21313 and by the California producing associations in Cause No. 21310, and will confine this brief to those specific points considered of most importance to the Petitioners.

These Petitioners would particularly urge the Court to carefully read both the hearing examiner's decision (Tr. 4903-4928) and the Commission's Opinion No. 495 (Tr. 5257-5263), as these Petitioners would submit that the inherent deficiencies in the PGT application are revealed therein.

SPECIFICATION OF POINTS RELIED UPON

1. The Commission failed to meet its statutory respon-

sibility to determine the best, cheapest, and most dependable source of natural gas and thereby to protect the interest of the public.

2. The Commission erroneously found that a market exists for the proposed additional sales by Pacific Gas Transmission to Pacific Gas and Electric, contrary to the evidence of record.

3. The Commission erred in granting the application for certification, based primarily on the utilization of the present Pacific Gas Transmission pipeline facilities to their fullest capacity.

ARGUMENT POINT NO. 1

THE COMMISSION FAILED TO MEET ITS STATUTORY RESPONSIBILITY TO DETERMINE THE BEST, CHEAPEST, AND MOST DEPENDABLE SOURCE OF NATURAL GAS AND THEREBY TO PROTECT THE INTEREST OF THE PUBLIC.

These Petitioners throughout these proceedings sought to present evidence relating to a cheaper and more dependable supply of natural gas than that proposed to be imported under the Pacific Gas Transmission application. The hearing examiner struck the evidence of Arlan Edgar, witness for the Permian Basin Petroleum Association and Bob R. Harris, witness for the State of Texas, both of whom would have shown the availability of ample gas supplies from the West Texas area. The testimony of witness Hunsaker, sought by subpoena, was denied by the hearing examiner and specifically affirmed by the Commission in its order of December 17, 1965. This excluded testimony would have established that large new additional supplies of gas were (and are) available from West Texas-New Mexico wells and can be delivered more cheaply than the Pacific Gas Transmission gas to the Northern California area.

This denial of the admission of this evidence, clearly relevant to this hearing and vital to support Petitioners' position, was a denial of due process guaranteed by the Constitution of the United States, and an abdication by the Commission of its statutory responsibilities.

The basis of the exclusion of testimony of witnesses Edgar, Harris, and Hunsaker by the hearing examiner was that it was not relevant or material since El Paso had made no competing application in this proceeding. (Tr. 136, 138, 140) The hearing examiner stated "it does not support or is it related to any application to dedicate any specific Texas gas for sale and transportation in interstate commerce." (Tr. 136)

The ruling of the hearing examiner in excluding this testimony is clearly contrary to the holdings and consistent rulings of the Circuit Courts of Appeals. In *City of Pittsburgh v. Federal Power Commission*, 237 F. 2d 741 (D.C. Cir. 1956), the Court said:

"The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity. That the Commission has no authority to command the alternative does not mean that it cannot reject the (original) proposal."

Similarly in *Scenic Hudson Preservation Conference, et al v. Federal Power Commission*, 354 F. 2d 608 (Second Cir. 1965), the Court held that an alternative or competing application need not be fully developed by the parties, but that the Commission itself had an affirmative duty to inquire into all possible alternatives. The Court stated its view of the Commission's role as the representative of the public interest as follows:

". . . This role does not permit it to act as an umpire

blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission. . .

“The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.”

The Commission itself has on occasion recognized this responsibility, and discharged it. (See *El Paso Natural Gas Company*, 30 FPC 77, the 1963 *Rocksprings* proceeding.)

In the *Scenic Hudson* case the Court relied heavily on both the *City of Pittsburgh* case supra, and *Michigan Consolidated Gas Company v. FPC*, 283 F. 2d 204, Cert. denied, 364 U.S. 913 (1960). In the *Michigan Consolidated* case, the Court recognized that Michigan Consolidated had presented an alternative proposal too late to comply with the statutory requirement; however, the Court stated

“(t)hese matters (set forth in Michigan Consolidated’s settlement proposal), on their face reflected the basis for an alternative to total abandonment, so apparently in the public interest, that their consideration at some point in the proceedings was indispensable to the validity of any public interest determination in support of total abandonment. In viewing the public interest, the Commission’s vision is not to be limited to the horizons of the private parties to the proceeding.”

In light of the holdings of these Courts, the hearing examiner was clearly in error in denying these Petitioners and others the opportunity to present the prepared testimony of witness Arlan Edgar and witness Bob Harris and in denying the application for issuance of subpoena duces tecum for the witness Barry Hunsaker. The testimony of these witnesses would have established the availability of an alternative and fully adequate source of natural gas at a

delivered California price much cheaper than that covered by the application of Pacific Gas Transmission.

In contrast to the gas available through existing Texas-California lines, the Canadian gas sought to be imported is not subject to Commission regulation as to price at the wellhead. (Tr. 434, 435, 436, 5259)

The Commission staff strongly urged that conditions be attached to the granting of this certificate to insure that at least some of the many indefinite pricing provisions be eliminated, but this was denied by the Commission. (Tr. 5258, 5259)

The primary disability of the Canadian supply sought to be imported by the PGT application is its total lack of a firm and stable price. Cross examination of Applicant's own witness Blair disclosed that at least 86 percent of the gas supply *of both the original and the enlarged facilities* is subject to an unlimited renegotiation and redetermination clause effective July 1, 1968. (Tr. 441-450) These contracts provide that in the event of dispute over the renegotiation price in 1968 a ruling by a three man board of arbitration will be final and binding on all parties. (Tr. 471-472)

Witness Malcolm Abel testified below that

"it is my conviction, based on my experience as a producer and seller of gas in Alberta and in the United States, that the renegotiation of the A and B contracts (which constitute 86 percent of the daily contract volumes of this Project) will inevitably result in a higher price than that specified in the periodic escalation schedules, and will in turn result in an increase in other contract prices where those contracts have an average weighted price determination provision," and "these Canadian contracts are the most generous interstate or interprovincial producer contracts that I have seen

throughout my experience in the business.” (Tr. 1547)

The hearing examiner discussed the indefinite escalation clauses contained in almost all of the Canadian production contracts in his decision (Tr. 4912, 4913, 4914), and stated (Tr. 4913)

“Since the issuance of this order (for the original construction) at 24 FPC 134, the Commission has determined that indefinite pricing escalation provisions of certain types in domestic producer contracts for the sale of natural gas in interstate commerce are contrary to the public interest. *Pure Oil Co.*, 25 FPC 383, *affirmed*, 299 F. 2d 370; See FPC Order No. 174-B, 13 FPC 1576; FPC Order No. 232, 25 FPC 379, as amended by Order No. 232A, 25 FPC 609; FPC Order No. 242, 27 FPC 339, and Section 154.91, *et seq.* of the Commission’s Regulations Under the Natural Gas Act; also *FPC v. Texaco Inc.*, 377 U.S. 33; *Atlantic Refining Co.*, 32 FPC 17.”

The hearing examiner specifically found that the Canadian subsidiary of PGT is now using the Form D contract which he stated contains no indefinite escalation clauses (Tr. 4914) but this finding is completely in error in the light of the sworn testimony of applicant’s witness Blair, *who admitted that some of the new Type D contracts have renegotiation clauses.* (Tr. 449, 450). His precise testimony on this point is as follows:

“Q. . . . you have the renegotiation provision in contracts A, B and D. This contract provision provides for renegotiation on July 1st, 1968, and every 5 years, is that correct?

A. Yes.

Q. Certain of the contracts in the Wilson Field, I believe in contract D?

A. Yes.

Q. They have the same type of renegotiation or retermination?

A. Yes, I said that I didn't remember whether in Wilson Creek we advanced that first year to 1973, that is the first year for renegotiation. My memory doesn't support me in this, whether we did or not, recognizing that 1968 was pretty close to start such a renegotiation. But it does contain a provision for renegotiation each 5 years thereafter."

Both witness Abel (Tr. 4912) and the hearing examiner (Tr. 4913) termed the 86 percent of the Canadian contracts as "open-ended."

These petitioners desired to incorporate in the record actual evidence establishing that the domestic supply of natural gas was cheaper than that proposed in this application. Though this opportunity was denied, Applicant's witness Frank strongly indicated (if he did not actually admit) that the domestic gas supply available from El Paso Natural Gas Company was actually cheaper than the Canadian gas supply. His precise testimony is as follows (Tr. 1221);

"Q. What figure did you use for that?

A. I used 22 cents per Mcf and approximately 18 cents per Mcf for Canadian, 22 cents for El Paso.

Q. Are those border prices or what prices are they?

A. 22 cents is approximately the border price at the California border.

Q. At Topock? (El Paso entry point)

A. At Topock, right; and the 19 cents are approximately the purchase price of the gas in the field.

Q. And the 18 cent price contains no transportation cost from the field?

A. No, sir.

Q. What is the distance from the Alberta fields to the load center at Antiock, sir, approximately?

A. Over a thousand miles." (Tr. 1221).

The above sworn testimony, given by Applicant's own witnesses under cross-examination, tends to confirm the fact that the El Paso (Texas) gas is cheaper than gas proposed to be imported under this application.

Not only do the Canadian contracts presently exceed the price of available domestic gas, but unlimited renegotiation and redetermination clauses in the Canadian contracts will trigger indefinite escalation prohibited by the Commission for United States gas. Contract types A and B provide a weighted-average price redetermination starting in 1968 (Tr. 453), and the company has a "postage stamp policy" of paying the same price for all gas of similar quality. (Tr. 253 and 469) Thus, with contract provisions for weighted average price escalation and a company policy of paying the same price for similar gas, when contracts of Type A, B, or D escalate by the 1968 renegotiation, all other Canadian producers can secure the same price by virtue of these factors.

Since the pipelines between the wellhead and consumer are on a cost-of-service basis (Tr. 4913), the higher wellhead prices will pyramid California consumer costs.

While the base price of Canadian gas on July 1, 1967, will be 17 Canadian cents per Mcf at the wellhead (Tr. 449) contract provisions for Btu premiums could result in payment of field prices as high as 19.13 Canadian cents per Mcf in 1967, even before the 1968 renegotiation (Tr. 449).

In approving the importation of this Canadian gas with its generous and indefinite wellhead contracts, the Commission has discriminated against domestic U.S. gas pro-

ducers, whom it will not permit to utilize similar contract provisions.

The Commission must insure that domestic consumers have the same degree of protection on the price of all gas which they purchase from interstate sources. *FPC v. Hope Natural Gas Company*, 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333. (1944); *Atlantic Refining Company, et al, v. Public Service Company of the State of New York*, 320 U.S. 378, 79 S. Ct. 1246, 3 L. Ed. 2d 1312 (1959). It has obviously failed to do so in Opinion No. 495.

Since the Commission erred in granting this certificate on an incomplete record, and did not determine the best, cheapest and most dependable source of natural gas for Northern California consumers, this Honorable Court should set aside the action of the Commission and remand this proceeding for a determination by the Commission of the most feasible and economical of possible alternative sources.

POINT NO. 2

THE COMMISSION ERRONEOUSLY FOUND THAT A MARKET EXISTS FOR THE PROPOSED ADDITIONAL SALES BY PACIFIC GAS TRANSMISSION TO PACIFIC GAS AND ELECTRIC, CONTRARY TO THE EVIDENCE OF RECORD

In a desperate bid to secure Federal Power Commission approval before its generous indefinite producer contract terms take full effect, the Applicant attempted to justify a need for a full-line volume of Canadian gas at this time. Applicant fell far short of establishing this point. For example, Applicant's own witness showed that PG&E interruptible gas customers have not been cut off at any time in the last two years (Tr. 1188, 1190), and this witness

estimated that these interruptible customers will secure 100 percent of their needs in 1967, 1968 and 1969, and 98 percent in 1970 (Tr. 1191), without the increased Canadian volumes.

More importantly, Applicant's witness Frank admitted that there will be no deficiency in PG&E supplies before the winter of 1968-69 (Tr. 1162), and if California-produced gas supplies only continue at their present rate there will be no deficiency in PG&E needs before the winter of 1970-71 (Tr. 1169).

As pointed out in voluminous evidence by the California gas producers, the refusal of PG&E to estimate any future California gas discoveries led to a ridiculously low estimate of California production (Tr. 1358, 1497).

The failure of PG&E to attempt to obtain additional supplies from El Paso Natural Gas Company was emphasized by the fact that PG&E Topock-Milpitas twin 34-inch lines have only three compressors along the entire 500 mile length (Tr. 1204-1205). Exhibit 46 shows that although PG&E has a regular El Paso contract for 1,025,000 Mcf per day (at 14.9 psia), it has received deliveries of over 100,000 Mcf per day more than this contract amount, even with the meager compression facilities on the Topock-Milpitas lines.

Similarly, Applicant's own witness admitted PG&E has received as high as 450,000 Mcf per day from the existing Canadian line (Tr. 1154), can obtain an additional 54,000 Mcf per day from El Paso and Pacific Lighting (Tr. 1159), and can receive an excess of 713,000 Mcf per day from California wells on a peak day as contrasted to an average day (Tr. 1160).

In view of the failure of Applicant to establish a need for the additional volumes of Canadian natural gas, the

Commission erred in granting the certificate in Opinion No. 495, and this Honorable Court should set aside such Opinion and accompanying orders and remand this cause to the Commission for a proper determination of this point.

POINT NO. 3

THE COMMISSION ERRED IN GRANTING THE APPLICATION FOR CERTIFICATION, BASED PRIMARILY ON THE UTILIZATION OF THE PRESENT PACIFIC GAS TRANSMISSION PIPELINE FACILITIES TO THEIR FULLEST CAPACITY

Both the hearing examiner and the Commission itself seemed persuaded to grant the PGT application by the fact that the present PGT line from Canada is being utilized at less than capacity.

The Commission stated in Opinion No. 495 (Tr. 5259):

“We think that the exceptions to the examiner’s initial decision must be denied and that the certificates applied for should be issued to the applicant. We are concerned here with already existing pipeline facilities which are not yet utilized to their fullest capacity. The increased use of the existing pipeline facilities will reduce the unit cost of the gas supplied to California and will also reduce the unit cost of transportation of gas transported for El Paso and destined for the consumers in Washington, Oregon and Idaho. To refuse to issue certificates authorizing the importation, transportation, and sale of this additional gas would mean that some of the capacity of presently existing facilities would remain unused with resultant higher costs to the consumers in four states.”

The hearing examiner stated (Tr. 4903):

“The various regulatory agencies recognized, when they authorized the construction and operation of this 36-inch line, that it was oversized for the throughput of the initially certified volumes of 415,000 Mcf per day. However, PGT there indicated that future authorizations would be sought to import additional volumes of natural gas to utilize the full capacity of the line.”

Both the Commission and the hearing examiner emphasized that utilization of the existing line for additional volumes should lower the incremental costs of natural gas to California consumers, but as pointed out in Point No. 1 above, this reduction is illusory, due to the upcoming renegotiation and escalation provisions in the producer contracts.

Since the Commission erred in granting the application for certification based primarily on the utilization of the present PGT pipeline facilities to their fullest capacity, this Honorable Court should set aside Opinion No. 495 and its accompanying orders, and remand this cause to the Commission for a determination of the question of the cheapest and best possible source of natural gas for use by Northern California consumers.

CONCLUSION

It is submitted that Respondent has not met its obligation under the Natural Gas Act to determine if this application is required by the present and future public convenience and necessity.

These Petitioners respectfully submit that this Honorable Court should set aside Commission Opinion No. 495 and its accompanying orders, particularly including the order of December 17, 1965, and remand this matter to the Commission with instructions requiring admission of

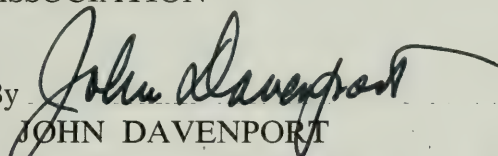
the evidence previously excluded and to determine if the facilities and inportation proposed in such application are in the public interest and required by the present and future public convenience and necessity.

Respectfully submitted,

TEXAS INDEPENDENT PRODUCERS &
ROYALTY OWNERS ASSOCIATION

WEST CENTRAL TEXAS OIL
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December 12,1966

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


JOHN DAVENPORT


CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing upon the following party:

Howard E. Wahrenbrock,
Solicitor
Federal Power Commission
441 G Street, N.W.
Washington, D.C. 20426

and all parties to the proceeding.

Dated at Austin, Texas this the 8th day of December, 1966.



JOHN DAVENPORT
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In the
United States Court of Appeals

For the Ninth Circuit

No. 21310

CALIFORNIA GAS PRODUCERS ASSOCIATION
INDEPENDENT OIL AND GAS PRODUCERS
OF CALIFORNIA
JADE OIL AND GAS COMPANY
Petitioners.

v.

FEDERAL POWER COMMISSION
Respondent.

On Petition to Review an Order of the
Federal Power Commission

**Initial Brief on Behalf of
California Gas Producers Association,
Independent Oil and Gas Producers of California,
Jade Oil and Gas Company**

FILED

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December 12, 1966

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- “A” Ex. No. 51 — Estimated and Actual Peak Day Deliverability of California Gas (Pacific Gas & Electric Company)
- “B” Ex. No. 46 — Map, Natural Gas Pipeline Interconnections between Northern and Southern California.
- “C” Comparison of Delivered Cost of Gas to PG&E at California Border

TABLE OF AUTHORITIES CITED

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**Initial Brief on Behalf of
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Independent Oil and Gas Producers of California,
Jade Oil and Gas Company**

PRELIMINARY STATEMENT

This case involves an appeal filed by the California Gas Producers Association, the Independent Oil and Gas Producers of California, and the Jade Oil and Gas Company ("California producers") for review of three orders issued by the Federal Power Commission ("FPC, Commission") authorizing a subsidiary of Pacific Gas & Electric Company ("PG&E") to import a large volume

of Canadian gas into northern California starting November 1966. (*Re Pacific Gas Transmission Company*, Docket No's. CP65-213, 214, 215).

These orders are:

- 1) Order Denying Reconsideration, Waiver of the Commission's Rules and Making Determination of the Question of "Extraordinary Circumstances" (issued December 17, 1965; R. 4890 - 4893).
- 2) Opinion and Order Issuing Certificate and Authorizing Importation of Natural Gas (issued June 15, 1966; R. 5315 - 5316).
- 3) Order Denying Applications for Rehearing (issued August 4, 1966; R. 5315 - 5316).

The appeal is filed pursuant to the provisions of Section 19 (b) of the Natural Gas Act (15 USC § 717r (b)).

QUESTIONS PRESENTED

1. In authorizing PG&E to import large volumes of Canadian gas into northern California starting in 1966 and 1967, can both PG&E and the FPC ignore completely the possibility of any new discoveries of natural gas in northern California after December 31, 1965 in determining whether a "market" exists in northern California for the newly authorized supplies of imported Canadian gas?
2. In authorizing PG&E to import large volumes of Canadian gas into northern California can the FPC refuse to receive and consider evidence showing the existence and availability of alternative supplies of natural gas from west Texas and New Mexico which could be delivered to the California border at a lower cost?

INTEREST OF THE CALIFORNIA GAS PRODUCERS

The California gas producers consist of:

- (a) The California Gas Producers Association — a voluntary association consisting of several medium-sized independent, and a number of smaller, producers of natural gas in California. The production represented is predominantly dry gas in the Sacramento Valley area (the northern part of California's Central Valley). The production includes reserves in the newly-discovered and developed major Dutch Slough, West Butte, West Grimes, Los Medanos, Lathrop, McMullin Ranch, and Willow Pass Fields in San Joaquin, Contra Costa, Sutter, and Colusa Counties.
- (b) The Independent Oil and Gas Producers of California (successor to the Oil Producers Agency of California) — whose membership consists of independent oil and gas producers in California covering oil and gas production in nearly all producing areas of the State. The Independent Producer's 50 - 60 members cover approximately 25% of California's oil production — with much of which the production of California's natural gas is associated.
- (c) Jade Oil and Gas Company — an individual California gas producer producing and selling natural gas in both northern and southern California.

The California producers are aggrieved by the FPC's Order Denying Reconsideration (issued December 17, 1965), Opinion No. 495 and the accompanying Order (issued June 15, 1966) and the Opinion and Order on Rehearing issued August 4, 1966, since by these orders the FPC approved the importation and delivery of up to nearly \$20 million a year of natural gas by Pacific Gas Transmission Company from the Province of Alberta, Canada to Pacific Gas Transmission Company's parent, Pacific Gas and Elec-

tric Company (PG&E), in northern California. These additional supplies of natural gas are being delivered and sold to PG&E in direct competition with similar volumes of natural gas produced and sold to PG&E by the California gas producers. To the extent that these large additional volumes of natural gas are delivered and received in northern California, and are sold to PG&E, the market for California produced gas will similarly be reduced by \$20 - \$30 million a year.

The California gas producers were active parties in the proceedings before the FPC in which the Opinion and Order complained of here was issued. They petitioned (R. 4256 - 4262; 4265 - 4269; 4415 - 4423) and were admitted as intervenors by FPC orders issued May 25, 1965 (R. 4374 - 4377), and July 27, 1965 (R. 4469). They attended and presented affirmative evidence, and participated in cross-examination at the extensive hearings before the FPC's Presiding Examiner in Washington, D. C. in September, 1965 (R. 1 - 1783). They sought — and were denied by FPC order issued December 17, 1965 (R. 4890 - 4893) — the right, along with other protesting parties, to require the production of certain evidence by subpoena. They filed Briefs (46 pages) with the Presiding Examiner, and Briefs on Exceptions (56 pages; R. 5026 - 5087) with the full Commission. Finally, after receipt of the FPC's Opinion and Order authorizing the importation of gas into northern California, they filed an appropriate Application for Rehearing (21 pages; R. 5285 - 5311 which was denied by Commission Order issued August 4, 1966 (R. 5315 - 5316)).

Briefly, it is the position of the California producers that under the circumstances in this proceeding, the FPC's act in authorizing the importation and delivery of these increased volumes of natural gas from Canada into northern California starting November 1, 1966, is not warranted by the "public convenience and necessity" under Section 7(e) of the Natural Gas Act (15 USC § 717f(e)), and is not "consistent with the public interest" under Section 3 of

the Natural Gas Act (15 USC § 717b). Although improperly made by the FPC, the FPC's action was made with finality, the new supplies of natural gas from Canada are now being received in northern California, and the petitioning California producers are "aggrieved" thereby.

GROUND'S UPON WHICH RELIEF IS SOUGHT

It is the position of the California gas producers that the FPC's Opinions and Orders of December 17, 1965, June 15, 1966 and August 4, 1966 are unlawful and improper in the following respects:

- 1) The Commission failed to consider Pacific Gas and Electric Company's estimated "cut-backs" of California produced gas in order to provide a market for the proposed importation of Canadian gas.
- 2) The Commission failed to adequately consider the availability of alternative supplies of natural gas from El Paso Natural Gas Company (or Transwestern Pipeline Company).

These matters were briefed before the Presiding Examiner and the Commission and were made the subject of the California gas producers Petition for Rehearing before the Commission (R. 5286 - 5311). After summary denial (R. 5315 - 5316), the California gas producers bring these issues to the Court here for decision.

ARGUMENT

I THE COMMISSION FAILED TO CONSIDER PACIFIC GAS AND ELECTRIC COMPANY'S ESTIMATED "CUT-BACKS" OF CALIFORNIA PRODUCED GAS IN ORDER TO PROVIDE A MARKET FOR THE PROPOSED IMPORTATION OF CANADIAN GAS.

In its Opinion, the Commission states simply that (Finding (6), page 6; R. 5256)):

"(6) A market exists for the proposed additional sales of natural gas by Pacific Gas Transmission Company to Pacific Gas and Electric Company."

In making this statement, the Commission disregards completely the fact that in order for PG&E to make a "market" for the Canadian gas which PGT (and PG&E) plans to import, PG&E estimates an unjustified reduction in its purchases of northern California gas.

a) The "Market" For Canadian Gas

Thus, in reply to questions, PG&E gas supply witness Haavik made a comparison of the indicated total available supply of gas to PG&E from individual sources for 1963 - 1964 (actual) compared with 1970 (Ex. No. 25; R. 2824).

SUMMARY OF ACTUAL AND ESTIMATED PG&E GAS PURCHASES

Average (Mcf per Day)	California Produced Gas		Canadian Gas	
	Average Daily Amount	Reduction From 1963	Average Daily Amount	Increase Over 1963
Actual:				
1963	632,000	—	348,000	—
1964	628,000	4,000	398,000	50,000
Estimated:				
1965	608,200	23,800	416,800	68,800
1966	604,200	27,800	433,200	85,200
1967	525,600	106,400	530,800	182,800
1968	453,500	178,500	614,400	266,400
1969	487,800	144,200	614,400	266,400
1970	328,200	303,800	614,400	266,400
Actual:	Exhibit 17, page 7, Columns q, s (R. 2390)			
Estimated:	Exhibit 17, page 9, lines 15 - 19 (R. 2392)			

Based on this overall gas supply, Mr. Haavik agreed that there would be a reduction in the purchases of California gas during the 1965 - 1970 period, and these reductions in the purchases of California gas would, except for about 40,000 Mcf per day, be exactly offset by increases in purchases of Canadian gas (R. 845).

Using 30¢ per Mcf for PG&E's purchases of northern California dry gas, Mr. Haavik stated that (based on his estimates) PG&E's estimated purchases of northern California gas would decline from \$63,900,000 in 1965 (215 billion cubic feet) to \$30,900,000 in 1970 (103 billion cubic feet) (R. 828 - 829).

It is, thus, abundantly clear that, based on PG&E's data of record in this proceeding that PG&E estimates sharp cuts in its purchases of northern California dry gas in order to create a market for its proposed imports of Canadian gas starting in November, 1966.

What the Commission's decision does is to create a "market" for PG&E's proposed importation of Canadian gas by denying that market to available supplies of locally produced northern California gas. No other basis can be found for the Commission's decision finding that a "market" exists for the proposed deliveries of Canadian gas which the Commission's decision authorizes.

b) The Availability of California Produced Gas

The only method, in fact, by which PG&E can justify its importing additional gas from Canada as early as November, 1966 in order to meet northern California requirements is by scheduling an unjustified drop in available northern California gas supplies by over 1000,000 Mcf per day, or nearly 20%, from present levels (Ex. No. 17, pages 7, 9; R. 2390, 2392; Ex. 25; R. 2825).

The necessity for PG&E's planned importations of Canadian gas in November 1966 must rest upon PG&E's "need" for such additional sources of gas supply in order to meet its average day market

requirement. This PG&E was able to justify only by:

- 1) Projecting sharp cut-backs in its estimated purchases of northern California gas, and
- 2) Shutting off all consideration of the availability of any future supplies of northern California gas.

Neither this premise, nor the estimates based on this premise, can be considered to be "realistic", as a basis for projecting the future supply of northern California gas available to PG&E. There will, in fact, be a much larger supply of northern California gas than forecast by PG&E, and this must be taken into account in determining the necessity for PG&E's proposed additional importation of Canadian gas.

In fact, in the past several years, PG&E's purchases of California gas have steadily increased (Ex. No. 17, page 7, lines 4, 13; R. 2390). It is, in spite of this continuous overall increase, however, that PG&E schedules sharp declines in its purchases of California gas, starting in 1967, the first full year for which PG&E seeks additional imported Canadian gas supplies (Ex. No. 17, page 7, line 13; page 9, line 14; R. 2390, 2392; Ex. No. 25; R. 2825).

In order to create the "market" which the Commission says "exists" for the importation of the additional authorized supplies of Canadian gas, PG&E schedules a reduction of 106,400 Mcf per day in its California gas purchases in 1967, compared with 1963. This amount is just enough, in PG&E's calculations, to justify commencing its additional Canadian gas importation of 100,000 Mcf per day in the winter of 1966. If, instead, PG&E's California gas purchases were maintained at the present 1963 - 1964 level, there would be no need for starting PG&E's additional importations of Canadian gas before the winter of 1967 - 68.

PG&E arrives at its conclusions by basing its estimates of future northern - central California dry gas as including "only that gas

which was under contract, or which could reasonably be expected to be under contract" at the time PG&E's estimate was prepared in March 1965 (Haavik, R. 774). These estimates include gas available from all of PG&E's then connected wells, and the gas available from a number of "unconnected wells" based on contracts in the process of negotiation to the extent that the wells would be connected by "the end of the year" or would "come under contract by the end of the year". These were reflected in PG&E's estimates. However, while PG&E projected the available supplies of gas from March through December of each year (reflecting the period of time from the date of actual preparation of estimate through the end of the year), *PG&E's estimates did not take into account any future projected unconnected wells after December 31, 1965* (Haavik ; R. 835 - 838, 924 - 928).

On this basis, PG&E's future forecasts are completely unrealistic.

First, PG&E's future forecasts of available California gas are completely unrealistic in ignoring any future discoveries of California gas.

Second, PG&E's methods of estimating available supplies of northern California gas are completely inconsistent with the methods for estimating available gas supplies used by PG&E's Canadian witnesses and by the Pacific Lighting Companies in southern California.

Third, all of PG&E's past estimates of available supplies of northern California gas have been completely unreliable as a basis for scheduling additional purchases of out-of-state gas.

It is the position of the California gas producers that, there will, in fact be a much larger supply of California gas than forecast by PG&E. This, the California gas producers assert, must be taken into account in determining the necessity for additional importations of Canadian gas starting in November 1966.

1) PG&E's Future Forecasts of Available California Gas are Completely Unrealistic in Ignoring any Future Discoveries of California Gas.

In this proceeding, under cross-examination PG&E's gas supply witness Haavik described in detail the method which he used in making his future estimates of PG&E's northern California gas purchases.

(a) California Produced Oil Well Gas Estimates

First, estimates were made for future available supplies of California produced *oil well gas*. These estimates included expected supplies of gas from the Brentwood, San Ardo, Vallecitos, and Kettleman Hills fields. In each instance, Mr. Haavik estimated that PG&E would be able to purchase the same amount of gas from these sources, *without decline*, in 1966, 1967, 1968, 1969, and 1970. (Haavik, 888); Ex. No. 28, p. 8; R. 2835).

In making these estimates of future oil well gas supply to PG&E, PG&E witness Haavik stated that it was a "reasonable assumption" that "the production would continue into the near future as it had prevailed currently" (Haavik; R. 888). In scheduling future oil well gas purchases, Mr. Haavik made the assumption that peak day gas supply available to PG&E from oil well gas sources at the "current level of estimated gas purchases by PG&E could be continued through January 1, 1971 and relied on to that extent for peak day gas supply" (Haavik; R. 890 - 891).

(b) Oil Company Use of Own California Produced Gas

Second, estimates were made of future *oil company use* of the available California produced gas transported (or "exchanged") across PG&E's integrated system. Except to reflect Standard Oil's decision to sell its Kettleman Hills gas to PG&E, starting in 1966 (instead of having it "exchanged" or transported by PG&E for Standard's account), in each instance, Mr. Haavik estimated that

the oil companies would have the same volume of gas available for PG&E to transport, *without decline*, in 1966, 1967, 1968, 1969, and 1970 (Haavik, Ex. 28, page 6; R. 2832).

(c) San Joaquin Valley Dry Gas Estimates.

Third, estimates were made for future available supplies of dry gas to PG&E from various sources in the San Joaquin Valley. These sources included supplies of gas from Buena Vista, Dudley Ridge, Gill Ranch, Hollister, and Moffat Ranch sources (Ex. No. 28, page 7; R. 2833).

In contrast to witness Haavik's treatment of the other San Joaquin Valley dry gas fields showing a field-by-field decline basis, Mr. Haavik estimated that PG&E's available supplies of gas from the Buena Vista Field would remain at the *same level* for the entire 1965-1970 period (Ex. No. 28, page 7; R. 2833).

In sum, it is only in contrast with the "reasonable assumption" that available supplies of oil well gas, oil company "exchange gas" and Buena Vista Field dry gas, would continue to be available both to PG&E and the northern California oil companies (Shell, Standard, and Tidewater) at the same volume level, throughout the forthcoming 1966 - 1970 period that PG&E's witness Haavik estimated sharp drop-offs in PG&E's forecast purchases of northern California *dry* gas.

2) PG&E's Methods of Estimating Available Supplies of Northern California Gas Are Completely Inconsistent With the Methods for Estimating Available Gas Supplies Used by PG&E's Canadian Witnesses and by the Pacific Lighting Companies in Southern California.

In order to put PG&E's declining estimates of available northern California dry gas purchases (based on a complete cessation of discoveries of gas) into perspective, the contrasting basis used in estimating future available gas supplies by PG&E's Canadian witnesses, and the Pacific Lighting Companies must be considered.

(a) PG&E's Estimates of Future Alberta Discoveries

PG&E's unwillingness to estimate future discoveries of northern California gas may be contrasted with the position of its witnesses testifying on behalf of Alberta and Southern Gas Co., Ltd. (PG&E's wholly-owned Canadian subsidiary purchasing gas from the Alberta producers).

As a result of the July 1964 proceedings before the Alberta Oil and Gas Conservation Board, the Board estimated the established reserves of marketable gas in the Province of Alberta, as of June 30, 1964, to be 35.7 trillion cu. ft., some 3.4 trillion cu. ft. representing reserves "presently considered to be beyond economic reach". The Board found that to June 30, 1965, the cumulative average growth in initial marketable reserves of gas due to new discoveries and to appreciation of previous discoveries to have been at a "long-term rate" of some 2.5 trillion cu. ft. per year. (Over the past two years, the Board observed, the annual rate has been "very slightly in excess" of the long-term rate, being 2.6 trillion cu. ft.). The Board expressed its confidence that the Province might reasonably count upon additional reserves in the amount of 5.0 trillion cu. ft. — equivalent to those that would be developed in a two-year period at the long-term growth rate.

In support of this finding, the Board summarized the testimony of the Alberta and Southern (PG&E) witness Blair, saying that a reserve growth rate for the Province of some 2.5 trillion cubic feet per year could be counted on for several years into the future (Report on the Applications of Trans-Canada Pipe Lines Limited and Alberta and Southern Gas Co. Ltd. under the Gas Resources Preservation Act, 1956, by Oil and Gas Conservation Board, Calgary, Alberta, Canada, November 1964; Ex. No. 22; Appendix B, pages B2 - B4; R. 2692 - 2694).

In addition the Federal Power Commission Presiding Examiner in the previous 1960 decision approving PG&E's initial imports of

Gas from Canada said that “the Commission, of course, dealt with “reasonable probabilities” and considered the trends in gas discovery in reviewing the “adequacy of gas reserve showing” (citing *Texas Gas Transmission Corp.* 8 FPC 190, 199 (1949) and *Transwestern Pipeline Company*, 22 FPC 391 (1959)). In recommending approval of PG&E’s initial import volumes in 1960, the Presiding Examiner pointed out that: “There is no question but that the trend is toward the addition of very substantial quantities of gas in Alberta each year during the foreseeable future”. It was only on this basis that the Presiding Examiner, and later the Commission, concluded that PG&E’s project had “fully adequate” reserves and availability to supply the project (24 FPC 144, 148-149). The Commission adopted this portion of the Presiding Examiner’s decision as part of its final order of approval (24 FPC 134, 135).

It is crystal clear that in order to secure a permit to remove the necessary quantities of gas from the Province of Alberta for importation into northern California, PG&E presented precisely the type of evidence — indicating the probability of future gas discoveries in Alberta — which as to major supplies of northern California dry gas it refused to present here.

**(b) Pacific Lighting Companies Estimates of
Southern California Gas.**

In its present Canadian import application proceedings, PG&E estimates its present and future supplies of northern California gas, as showing a sharp decline in availability, dropping from a present level of about 630,000 Mcf per day to only 328,200 Mcf per day by 1970 (Ex. No. 25; R. 2825). This is in sharp contrast to the Pacific Lighting Companies estimates of future available supplies of California produced gas (including both oil well gas and dry gas) in southern California, which show no such decline (Haavik; R. 881-882).

The difference is that in estimating available supplies of northern California dry gas for import certificate purposes, PG&E

does not take into account any new discoveries after December 31, 1965, thus excluding all new field discoveries, as well as any field reserve revisions since that date. The Pacific Lighting Companies, on the other hand, use a 1953-1962 10-year production trend which necessarily includes estimates of new discoveries based on past experience. In addition, the Pacific Lighting Companies make specific estimates of the availability of gas from pressure maintenance, or gas injection, projects which are expected to be terminated in the next few years. (Beyond 1970, the Pacific Lighting Companies have also estimated available supplies of California gas from off-shore sources beyond the present three-mile limit.)

As the Federal Power Commission said, as recently as July 26, 1966 in discussing the demand and supply for gas in *southern California (Re Transwestern Pipeline Company, et al., Opinion No. 500, page 22)*:

"To these available supplies must be added an allowance for gas received from California sources. Pacific Lighting provided extensive evidence on this question. As Pacific Lighting shows, most of the gas from California production is oil-well gas and is subject to the contingencies of oil production. Pacific Lighting's witness studied individual fields, and, making his estimates for the years 1966 through 1970, he included future volumes available under existing contracts and under those which are currently the subject of negotiations with producers. *Total supply from all other sources considered to be available in 1965 was trended to obtain the estimated volumes for subsequent years. This trend is designed to reflect both normal decline in production and the addition of new sources of gas.* In addition the witness included for 1968 and later years an estimate of supplies to be obtained from currently operative gas injection projects.

On this basis the witness estimated the supply from California sources to be 228 M³cf in 1968 and 221 M³cf in 1970" (Emphasis supplied).

It is exactly PG&E's refusal to recognize that these future additional supplies of northern California dry gas will be available to meet PG&E's future needs that provides the basis for its contrasting estimate of a sharply declining supply of California produced gas.

In an area in which PG&E in fact purchases 95% of the available gas supply, the delivery of any additional gas supply to the area, *pro tanto*, reduces PG&E's forecast increased market requirements. (Ex. No. 17, page 5, line 28, column (f); R. 2389).

In the usual FPC proceeding, in which a natural gas transmission pipeline company is required to purchase its gas supply in competition with other natural gas transmission pipeline company purchasers, the Commission's policy of requiring a contracted-for 20-year supply is appropriate. Thus, in "proving-up" its Canadian gas supplies, purchased in competition with purchases by West-coast Transmission, Trans-Canada, and local Alberta gas distribution companies, it is requisite for PG&E to show a contracted-for supply sufficient to meet the Commission's gas reserve and deliverability requirements.

Such "contracted-for criteria, however, cannot properly be applicable in a gas purchase area in which: (1) there is, for all practical purposes, only one potential gas purchaser, and (2) any sales of additional gas in the producing area would, *pro tanto*, reduce the area's overall market requirements for gas. In such an instance, if no cognizance were to be taken of future expected gas supplies, it would be easy enough for an applicant before the FPC (like PG&E) to "manufacture" its indicated requirements for additional out-of-state gas supplies by merely refusing to con-

tract for local gas supplies at hand.

3) All of PG&E's Past Estimates of Available Supplies of Northern California Gas Have Been Completely Unrealistic and Unreliable As a Basis for Scheduling Additional Purchases of Out-of-State Gas.

In order to demonstrate the extent to which PG&E's previous estimates of northern California dry gas, prepared on the premise that there would be no future discoveries of dry gas in northern California, were unrealistic and unreliable, the California gas producers presented Mr. Harold H. Heidrick, formerly Head of the Gas Section of the California Public Utilities Commission at the time of PG&E's previous 1960 application to that Commission (and the FPC) for authorization to construct and operate the present PG&E Canadian line.

Mr. Heidrick stated that, in contrast to the pro-forma presentation of the California Commission in these proceedings (covering only two minor points concerning Pacific Gas Transmission's allowable rate of return and depreciation salvage credit), in the 1960 proceeding the California Commission Staff had presented a detailed gas supply and requirements exhibit for northern California, considering California supplies, out-of-state supplies, and other available means of using peaking gas. In that study, Mr. Heidrick stated the California Commission's Staff had estimated that California gas production would continue up to 1970 at a constant rate "maintaining the same (1959-1960) level". No such study was made by the California Commission and made a matter of record in the present proceedings (Heidrick; R. 1496 - 1497).

In contrast to the California Commission's estimate of a future supply of California gas at the "same level" (and PG&E witness Haavik's estimate of a decline in the deliverability of northern California gas) in the intervening six years, production of northern

California gas has "actually continued its upward trend" (Tr. Heidrick; R. 1496 - 1497).

(a) Unreliability of Previous PG&E Estimates

In his testimony concerning the reliability of past PG&E estimates of northern California gas purchases, Mr. Heidrick compared PG&E's estimates of northern California gas supplies as presented in other previous proceedings with the actual amounts of northern California gas available on the estimated dates. These comparisons, he said, covered PG&E estimates of northern California gas supplies presented in the previous 1960 proceedings before this Commission when PG&E sought authorization for original construction of its Canadian line, as well as annual estimates which PG&E is required to submit to the California Public Utilities Commission (Heidrick, R. 1452).

In making these comparisons, Mr. Heidrick said that PG&E's estimates of northern California gas supplies fell short of actual purchases in the estimated future years, in each instance, the difference being greater in the more distant future years. Thus, Mr. Heidrick pointed out that PG&E's estimates for the first year or so in the future were "relatively close" to its actual purchases in that year. For other future years, the difference, he said, became "progressively greater", and PG&E's estimates of future northern California gas purchases more than two or three years in the future fall "sharply below the amounts of northern California gas actually purchased in an individual year" (Heidrick; R. 1454).

**PACIFIC GAS AND ELECTRIC COMPANY
COMPARISONS OF ESTIMATED (1960 - 1970) AND
ACTUAL (1960 - 1964) NORTHERN CALIFORNIA GAS PURCHASES**

ANNUAL PURCHASES (Bcf)				
Year Estimated	1960 Canadian Application Proceedings	1962 Calif. Gas Report	1963 Calif. Gas Report	1964 Calif. Gas Report
1964				
Actual Purchase (Dry)	217.8	217.8	217.8	217.8
1964				
Estimated Purchase (Dry) adjusted for Oil	84.4	167.1	204.7	215.9
Estimated as Percent of Actual	39%	77%	94%	99%

Source: Heidrick, Ex. No. 50 (R. 2884).

The reason for this widening difference, Mr. Heidrick said, was accounted for by the fact that PG&E's estimates of future PG&E purchases of northern California (or Northern Central) dry gas "includes only that gas which was under contract, or which could reasonably be expected to be under contract at the time the estimate was prepared". As a result for any time in the future, PG&E's methods of estimating future supplies of northern California dry gas "substantially underestimate" the supply of northern California dry gas that actually became available. In the original 1960 Canadian import proceedings before both the California Public Utilities Commission and the Federal Power Commission, PG&E estimated that the amount of northern California dry gas would

amount to 84.4 billion cu. ft. in 1964. Compared to this estimate, in 1964, PG&E actually purchased 217.8 billion cu. ft. of northern California dry gas, *over 2½ times as much as it estimated in 1960, its 1960 estimate amounting to less than 40% of the gas which actually became available 4 years later.* Instead of an estimated average of 231,000 Mcf per day for 1964 upon which PG&E based its application to the Federal Power Commission in 1960, PG&E actually purchased a total of 624,000 Mcf per day in that year — the last year for which actual annual data are available (Heidrick, R. 1455 - 1456).

In 1962, two years later, PG&E again substantially underestimated the amount of northern California dry gas which would actually be available for purchase. PG&E's estimate for that year was 167.1 billion cu. ft., or about 458,000 Mcf per day, its estimated 1964 northern California dry gas supply having *doubled* in that two-year period. Nevertheless, this doubled estimate fell far short of the actual available supply of northern California dry gas amounting to about 624,000 Mcf per day actually available in 1964. It is only when PG&E limited its estimates of northern California dry gas supplies to a year or so in advance have PG&E's estimates been even close to the actual.

(b) Contrast With PG&E Permian Basin Case Estimates.

In the *Permian Basin Area Rate Proceeding* (Docket No. AR61-1, et al., December 1961) before the FPC PG&E's witness Frank presented an estimate of the supply and demand for gas in northern California.¹ As to the available supply of northern California gas, Mr. Frank stated that (Heidrick; R. 1457 - 1958):

"California Dry Gas

"New discoveries of California dry gas are assumed to offset depletions through 1970. This assumption results

¹ Mr. Harold Z. Frank was also a witness in the present Canadian import proceedings (Frank; R. 1219-1220).

in a peak supply of 1140 M²cf per day. The annual amount that northern California companies will be obligated to take is estimated at 170,000 M²cf in the year 1970 which amount approximates the current level. (Emphasis supplied).

"California Oilwell Gas

"This gas is produced in conjunction with oil production and is independent of gas demand. *The 25,014 M²cf production estimated for 1970 is the same as the present production.*" (Emphasis supplied)

In every year since Mr. Frank's estimate was made in the latter part of 1961, the production of northern California gas taken has in fact substantially exceeded even Mr. Frank's estimate (Heidrick; R. 1460):

"... PG&E's policy in these proceedings of excluding all consideration of future discoveries, extensions, and revisions of estimated reserves of northern California dry gas has meant consistently underestimating the amount of northern California dry gas which has actually become available. While PG&E's estimates for current and near-by years are relatively accurate, in the years further into the future, the estimates become progressively unreliable, resulting in estimates as low as only 45% of the gas which has actually become available. The basis of estimating used by PG&E's witness Frank in the Permian Basin "area rate" proceeding, in which current production of northern California dry gas is offset by future discoveries, extensions, and revisions of such reserves has proved to be much more accurate even though it was based on conditions as far back as December, 1961."

Based in the pragmatic test of PG&E's previous northern California gas estimates against the actual availability of northern

California gas supply, it is clear that as a result of PG&E's policy to ignore the possibility of any future discoveries of northern California dry gas all of PG&E's past estimates of available supplies of northern California gas have been completely unrealistic and unreliable as a basis for scheduling additional purchases of out-of-state gas. Since the same basis for estimating such supplies was used in these proceedings, there is no reliable basis, using PG&E's estimates, upon which to schedule the receipt of additional Canadian gas supplies into northern California starting in November 1966.

4) Production and Reserves of Gas in Northern California Have Consistently Increased Over the Past 10 Years

In contrast to the pessimistic point-of-view taken by PG&E's gas supply witness that no reliance of any kind could be put on the possibility of future discoveries of natural gas in northern California after December 31, 1965, the facts are that over the past ten years there has been a dramatic increase in the production and reserves of natural gas actually discovered in northern California. Nothing in the record indicates any basis for the sharp "cut-off" used by PG&E as a basis for its estimates for the importation of additional Canadian gas starting in November 1966.

Based on these estimates, PG&E witness Haavik agreed that the "most encouraging" availability of gas based on past trends had been the availability of reserves for "non-associated" gas, this non-associated category being the principal source of PG&E's California gas supply (Haavik; R. 842-843). In fact, in each of the past 5 years for which PG&E witness Haavik had made estimates, available supplies of northern California dry gas have been in excess of the previous year. Mr. Haavik stated that it was "probable" that PG&E's estimate of the California gas supply would, in fact, be greater in 1966 than it was at the time PG&E's estimates were presented to the FPC (Haavik, R. 839).

Yet, compared to this continued actual increase in northern California dry gas production and reserves in the past 10 years, PG&E estimated purchases of northern California dry gas in 1965-1970 reflecting estimates to cut-back its purchases of northern California dry gas sharply, thus increasing the life-index of the remaining dry gas, and providing a "captive" cushion of gas always at hand in PG&E's "back-yard" (Haavik, Ex. No. 17, page 5; R. 2389).

In contrast, both of the witnesses presented on behalf of the California gas producers agreed that, instead of the sharp declines of 13% - 16% per year which PG&E's witness Haavik forecast for PG&E's future supplies of northern California dry gas, these sources of California produced gas could be relied on for several years to come at approximately the present level of production (Fazio; R. 1363):

"... at least for the short period, 1965-1968, for which PG&E is seeking to import additional supplies of natural gas from Canada, PG&E should appropriately rely on maintaining the latest 1964 current level of northern California dry gas purchase of 217.8 Bcf per year (597,000 Mcf per day), before determining to import additional supplies of natural gas from Canada. In addition to this supply of northern California dry gas, PG&E's future estimated supply of California produced gas from other sources ... should be added, if a realistic appraisal is to be made of the need for importing additional supplies of Canadian gas into northern California during the current 1966-1968 period. This would provide a total estimated supply of northern California dry gas and other (oilwell) gas of approximately 630,000 Mcf per day at least through 1968."

As has been previously shown, the adoption of such a current continued level, of about 630,000 Mcf per day, for PG&E's pros-

pective California produced gas purchases of 1966, 1967, 1968 would be equivalent to adding 106,400 Mcf per day of additional California produced gas to PG&E's estimated supply in 1967, and an even greater amount in 1968 (Ex. No. 25; R. 2825). *Such an additional amount would be more than enough to warrant deferment of PG&E's proposed purchases of additional supplies of Canadian gas from November 1966 to November 1967, or later.*

Based on the data of record in this proceeding there is no basis for the Commission's finding that a "market exists" for the importation of the additional supplies of natural gas by PG&E from Canada starting as early as November 1, 1966, as the Commission authorized in its decision (Finding (6), page 6; R. 5263).

II) THE COMMISSION FAILED TO ADEQUATELY CONSIDER THE AVAILABILITY OF ALTERNATIVE SUPPLIES OF NATURAL GAS FROM EL PASO NATURAL GAS COMPANY OR TRANSWESTERN PIPELINE CO.

In its decision in this case, the Commission's opinion states that the "record" in the case does not demonstrate that "alternative methods" exist for providing the needed volumes of additional gas at "more advantageous" rates and conditions (citing the *Rock Springs* case). In making this statement, the Commission conveniently ignores the fact that it was precisely the rulings of the Commission's Presiding Examiner, and the Commission itself which prevented making this information a matter of record (Cf. Order Denying Reconsideration issued December 17, 1965; R. 4890 - 4893) (Opinion, page 3; R. 5259).

In these proceedings, the State of Texas and TIPRO (supported by the California gas producers, and IPAA) sought to have incorporated as a matter of record in this proceeding certain testimony and exhibits introduced by El Paso's chief pipeline construction witness in the *Gulf Pacific* proceeding (Hunsaker, Ex. No. 56 (testimony); R. 2920 - 2933, and Ex. No. 57 (exhibit);

R. 2934-3032)). This testimony showed exactly the facilities, the cost, and method of delivering an additional 250,000 Mcf per day of natural gas by El Paso Natural Gas Company to PG&E's facilities on the Arizona-California border, using additions to El Paso's "existing" pipeline system.

Not only did this testimony cover an "alternative" means of delivering a 25% *greater supply* of natural gas to PG&E, the ultimate purchaser in the present proceeding, but it proposed to do it at a *lower delivered price* by securing additional throughput over *existing* El Paso lines. Thus, the comparison which would have been posed to the Commission for consideration would have been a direct one: Which of two existing natural gas transmission pipeline systems supplying PG&E should be increased in order to provide the additional deliveries of natural gas sought by PG &E in these proceedings?¹

1) Additional Supplies of El Paso Gas are in Fact Available to PG&E Without the Construction of Any Additional Out-of-State Facilities

Before making any determination of the necessity of importing additional supplies of Canadian gas, it must be recognized that substantial additional supplies of El Paso gas are, in fact, available to PG&E, without the construction of any additional facilities either outside, or within, the State of California. In

¹ That such additional supplies of natural gas by El Paso from west Texas sources are available even today is apparent from the recent testimony of El Paso's President Boyd before the FPC (*Re El Paso Natural Gas Company* (Westcoast Transmission import proceeding), Docket No's G-8932, CP66-315, September 20, 1966, Tr. 247). In addition to the volumes recently certificated in the *Gulf Pacific* proceeding, Mr. Boyd said that El Paso had "additional availability of natural gas to California" on El Paso's system out of the Permian Basin. There was he said, "easily" 100,000 Mcf per day "available out of there "now", as a "floor" without any "ceiling" as to the amount which might be available. The area, he said, "has to be subject to further development . . . and is one of the hottest areas in the United States today". Mr. Boyd emphasized that "there is probably more money being spent there by producers than any other single area in the United States". This area, he said, "can be a huge source of future discovery".

addition the California border price of these additional El Paso supplies is lower than the incremental cost at the California border of the additional Canadian supplies which PG&E is asking authority to import.

In PG&E's gas supply study, PG&E's gas supply witness included only 1,020,300-1,035,300 Mcf per day for deliveries of gas available to PG&E from El Paso (Ex. No. 17, page 9, line 17; R. 2392). The fact of the matter is that El Paso gas is available in much greater quantities, and these greater quantities *over existing facilities* should be taken into account before consideration is given to authorizing additional imports of natural gas from Canada, requiring vast new expenditures totalling \$ 29,947,000 for natural gas transmission pipeline facilities (Blasdale; R. 1326 - 1330; Ex. No. 45).

The uncontradicted testimony in this proceeding shows that El Paso's existing deliveries to PG&E, the Pacific Lighting Companies, and the two companies combined, have been well in excess of the contract delivery volumes (Ex. No. 46; R. 2880).

To date, as recently as July 29, 1965, El Paso's deliveries to PG&E reached 1,144,811 Mcf per day, 119,811 Mcf per day in excess of the level for which PG&E estimated its continuing purchases of El Paso gas in 1966, 1967, 1968, and subsequent years (Ex. No. 46 R. 2880). In fact, on February 26, 1965, El Paso's total capacity deliveries to California were 2,441,802 Mcf. After subtracting the Pacific Lighting Companies' entitlement of 1,130,000 Mcf per day of "basic" gas (Rate Schedule G) and 100,000 Mcf per day of "interim" (semi-firm) gas (Rate Schedule G-1), this leaves capacity for deliveries of 1,211,802 Mcf per day to be made by El Paso to PG&E (at the same Topock-Needles delivery point on the Arizona-California border). After deducting PG&E's "basic" contract supply of 1,025,000 Mcf per day, this indicates additional El Paso capacity of 186,802 Mcf per

day available to meet PG&E's needs — over and above the minimum "basic" contract volumes of 1,025,000 Mcf per day used in PG&E's gas availability estimates (Ex. No. 46; R. 2880, Ex. No. 17, page 9, line 17; R. 2392). *This amount is virtually equal to the 200,000 Mcf per day of Canadian import authorization which PG&E is seeking in this proceeding.*

In addition to this, PG&E's statements to El Paso and the Commission indicate that PG&E's existing Topock-Milpitas system for the receipt of El Paso gas within the State of California can carry 72,000 Mcf per day of additional deliveries without *any* additional facilities (Application of El Paso Natural Gas Company, Docket No. CP65 - 45, filed August 10, 1964). The receipt of additional deliveries from El Paso, above and beyond these volumes (1,037,000 Mcf per day plus 72,000 Mcf per day, or a total of 1,109,000 Mcf per day) is also possible, since PG&E has in fact received up to 1,144,811 Mcf per day from El Paso as recently as July 29, 1965 (Ex. No. 46; R. 2880).

As a matter of fact, at the present time, in order to get rid of PG&E's "excess" supplies of El Paso gas, PG&E sold 100,000 Mcf per day of its El Paso deliveries to the Pacific Lighting Companies in southern California on a firm basis. These firm deliveries stopped October 31, 1966, and this additional El Paso supply has again become available to PG&E (Moulton, R. 1732, Ex. No. 63; R. 3054 - 3056).

Furthermore, there is no question from the evidence of record that additional supplies of such El Paso gas are available to PG&E at a lower price at the Arizona-California border (El Paso Rate Schedules G, G-X, 22.22¢ per Mcf, Item D, R. 3091-3094; Transwestern Rate Schedule LX, 21.00¢ per Mcf, Item F, R. 3110) than the cost of PG&E's Canadian supplies at the Oregon-California border (1968, 23.33¢; 1969, 24.03¢; 1970, 24.47¢ per Mcf, Blasdale Ex. No. 19, p. 2; R. 2411).

Certainly, the availability of this additional capacity and supply of gas to PG&E over PG&E's and El Paso's existing system, available without any expenditure for out-of-state facilities should be considered before authorization is granted by this Commission to import additional supplies of gas to California which will be the areas' requirements.

Thus, in contrast to the over \$29 million that would have to be spent by PG&E to secure the additional requested supply of Canadian gas, PG&E would have to make *no additional investment* of any kind to receive the benefit of such existing unused capacity in El Paso's lines.

Under these circumstances, no justification exists for PG&E's initiating its planned importation of Canadian gas as early as November 1, 1966 as long as capacity already exists to supplement deliveries from El Paso's existing installed natural gas transmission line sources.

2) The Actual Delivered Cost of the Additional El Paso and Transwestern Gas Would be Less Than the Estimated Incremental Cost of PG&E's Additional Proposed Canadian Supplies

In its testimony, PG&E indicated that the delivered cost of its Canadian gas supplies at the Oregon-California boundary is (Blasdale, Exhibit 19, page 4, lines 12, 24, 25; R. 2413):

	1966	1967	1968	1969	1970
Average Cost	32.39¢	31.14¢	30.96¢	31.13¢	31.11¢
Incremental Cost	—	—	23.33¢	24.03¢	24.47¢

This is not the delivered price of PG&E's Canadian gas at its Antioch, California, load center (on the Sacramento River) used as a basis of comparison in the previous, initial, PG&E Canadian certificate proceeding (*Re Pacific Gas Transmission Company*, 24 FPC 132, 164-165 (1960)), but is the delivered

cost at the Oregon-California border, approximately 300 miles north (Brooks, Exhibit 9, page 3, (Map); R. 2330).

Compared to this, the delivery point of "alternative" supplies of El Paso gas to PG&E at the Arizona-California border (the furthest point away at which El Paso gas would be available) is also about the same distance from PG&E's Central Valley (Bakersfield-Fresno) market (Heidrick, Exhibit No. 47; R. 2881). Deliveries of Transwestern gas by the Pacific Lighting Companies at the Pacific Lighting-PG&E main line cross-over point near Barstow would be even closer (Heidrick, R. 1446). The other interconnection points between the Pacific Lighting and PG&E systems lie throughout the common Central Valley system area of both companies as far north as Fresno (Heidrick Ex. No.s 47 - 49; R. 2881 - 2883).

Representatives of El Paso and Transwestern estimated in the Gulf Pacific case that when the Commission's *Permian Basin Area Rate* decision is made effective (Opinion No. 468, issued August 5, 1965, now stayed on appeal to the Court of Appeals for the Tenth Circuit), there will be a reduction of over 1¢ per Mcf in the delivered Arizona-California border price of their gas. This would indicate a competitive commodity price for gas delivered to PG&E of:

El Paso	Excess Gas Service (G-X)	21.22¢ per Mcf
Transwestern	Limited Excess Gas (LX)	20.00¢ per Mcf

Compared to the cost of PG&E's added deliveries of Canadian gas at the Oregon-California border at between 23.33¢ - 24.47¢ per Mcf (Blasdale, Exhibit 19, page 2; R. 2411) the reduced cost of the available El Paso Excess Gas Service (Rate Schedule G-x) deliveries at 21.22¢ per Mcf and Transwestern Limited Excess Gas Service (California) (Rate Schedule LX) at 20¢ (and 23¢) per Mcf is $3\frac{3}{4}$ - $4\frac{1}{2}$ ¢ less than the cost of the additional Canadian gas which PG&E proposes to import. In addition, these Trans-

western and El Paso "Excess" gas service deliveries will be available at little or *no* additional cost to PG&E, compared to the \$13,837,000 of additional facilities required to receive the added Canadian gas deliveries. (See Comparison of Delivered Cost of Gas to PG&E at California Border, Appendix "C", attached.)

The availability of such an alternate source of natural gas from El Paso at a cost between 20½¢-22½¢ per Mcf is a matter of record in the proceedings, being set forth in a Memorandum on the Comparative Costs of Additional Out-of-State Gas prepared by PG&E's chief policy witness (Moulton, Ex. No. 64, Table 3, Col. 2; R. 3061).

At no place on the record, either by the Presiding Examiner, the parties, or by the Commission itself, is any examination, or analysis made of this definitive alternative. It is the California gas producers contention that under the law as it now stands the Commission must make some analysis of the alternatives presented to it if it is to discharge its responsibilities to the consumers of natural gas under the terms of the Natural Gas Act.

This not only has the Commission, its Presiding Examiner and its Staff failed to do, but it has shown a decided distaste to even recognize that any such issue exists. Unfortunately, in the circumstances presented here, the Commission cannot merely sweep this issue "under the rug" in the hopes that if it is not mentioned, it will "go away". A decision, difficult as it may be, must be made if the Commission's responsibilities are to be discharged.

After shutting off consideration of any such testimony, the Commission then seeks to justify its decision by citing the lack of any such testimony or evidence as a matter of record in reaching its decision! It is from this action that the California gas producers appeal.

3) Under Commission Precedents, It is Sufficient that "A More Desirable Alternative" be Present to Make Its Consideration Relevant and Material

The Commission's statement that "the facilities for bringing this gas (via El Paso) to California . . . are not now available, nor can they be available for some time" (Opinion, page 4; R. 5260) is not sufficient to take the case out of the rule announced by the Court of Appeals in the *City of Pittsburgh* and *Consolidated Edison* cases that the existence of a "more desirable" alternative must be considered by the Commission in rendering its decision. It is demonstrably certain, in the whole course of the Commission's conduct, culminating in its Opinion here, that no such consideration was given.

The thrust of the Commission's decision is that while arguments as to the adequacy and availability of "alternative methods" of securing any needed additional supplies of natural gas are relevant in determining whether to certificate a new pipeline project (such as PG&E's initial Canadian pipeline), they are not "appropriate" in determining whether "existing" pipeline facilities should be used to deliver additional quantities of gas. This, of course, is not the law, since each certificate application before the Commission is required to be tested against the standard of the "public convenience and necessity", whether that application is for a wholly new natural gas pipeline project, or merely for the expansion of an existing pipeline. While the fact of alternative economics, and "incremental" vs. "average" costs may be involved in a different factual way in an expansion program, as distinguished from a new natural gas transmission pipeline certificate application, the necessity of weighing the "alternative methods" available still remains.

Even if a pipeline is once built, it does not mean that the Commission can dispense with a critical examination of the need

to expand the line, especially where lower cost "alternative methods" may be available. The Commission's theory, carried to its ultimate conclusion would mean that consumers were saddled with the cost of expanding an already installed pipeline even if lower cost supplies (lower than even the "incremental" costs of delivery Canadian gas) were available. It is precisely this proof which TIPRO, IPAA, the State of Texas, and the California gas producers sought to present in the proceedings, and which has been first denied, and then "swept under the rug" by the Commission in its decision.

In support of its refusal to consider any "alternative means" of delivering the same supplies of gas to PG&E from domestic sources, the Commission cites only its previous decision in the *Rock Springs* case (*Re El Paso Natural Gas Company, et. al.*, 30 FPC 77 (1963)) (R. 5259).

Contrary, however, to the Commission's assertion that in the *Rock Springs* proceeding the "record" provided the basis for alternative means of serving California not available in these proceedings, no competing applications existed upon which the Commission could base its opinion. There, as here, the Commission had to make its determination rejecting El Paso's Rock Springs project proposal on the basis of evidence as to (30 FPC at pp. 85-88):

- (1) "One alternative route . . . involves the use of Transwestern's pipeline, which now receives gas from the Panhandle area and the Permian Basin area and delivers it to Pacific Lighting . . . "
- (2) "Transwestern also produced evidence showing that it could either transport 237,500 Mcf per day of CIG's gas and the additional 237,500 Mcf per day from El Paso . . . "

- (3) "Another alternative indicated by the record evidence would employ the northern segment of El Paso's Southern Division . . . utilizing the existing exchange agreement between El Paso Northern Natural Gas Company . . . "
- (4) "As the Examiner points out, this gas could be delivered by El Paso in the same way it proposed to to deliver 2000,000 Mcf per day to Pacific Gas and Electric Company . . . "
- (5) "The Staff introduced evidence as to a further alternative. This would involve use of the line of Pacific Gas Transmission Company and PG&E would approximately double the present capacity of 450,000 Mcf per day."

The essential difference between the *Rock Springs* case, and the present one is that in the *Rock Springs* case an active FPC Staff definitively explored the alternative methods of rendering the same service. In this proceeding, the FPC Staff did *nothing* to discharge its duty to present feasible alternatives to the Commission. On top of this, both the Presiding Examiner, Commission Secretary, and the Commission itself took every opportunity to shut off any consideration of testimony along these lines sought to be presented by the State of Texas, TIPRO, IPAA or the California gas producers.

After shutting off consideration of any such testimony, the Commission then seeks to justify its decision by citing the lack of any such testimony or evidence as a matter of record in reaching its decision!

This complete dismissal of any inquiry into any possible "more desirable alternatives" in this case may be contrasted with the next case to come before the Commission involving additional

imports of gas from Canada — this time to expand El Paso and West-coast Transmission's existing pipeline in order to increase deliveries to the Pacific Northwest market (Washington, Oregon, and Idaho). There at the outset of the hearings the Commission itself, by order, specified that "alternative" means of supplying the same volume of deliveries should be made a matter of inquiry (*Re El Paso Natural Gas Company*, Docket No's G-8932, CP66-315, order issued June 24, 1966):

- "(1) Are there alternative means available to meet the needs of the Northwest customers which would be more preferable than the proposal herein?
- "(2) Is there a market at this time for the volumes of gas proposed to be sold and transported by El Paso?
- "(3) Is it in the public interest to permit El Paso to import the additional volumes of natural gas at the price proposed to be charged by Westcoast Transmission Company?
- "(5) Should a domestic pipeline rely upon Canadian reserves to the degree that is herein proposed or should restrictions be placed upon the importation of natural gas, in light of the facts in this case?"

In that case FPC Staff Counsel stated the FPC's official position that (Tr. 117 - 118, July 12, 1966):

"Mr. Harkaway: It may be IPAA, TIPRO or Texas or anyone else can come in and show gas is available and there are means to move it up to the Pacific Northwest area, which of itself, and notwithstanding that no certificate application has been submitted, would be a possible alternative which should be explored."

"If Your Honor will recall for example in the *Rock Springs* case of recent infamy, the Commission denied a

certificate to El Paso when it was shown on the record *through statements of various parties* there might be better alternatives, as admitted you remember by the parties themselves subsequently. The fact no certificate was filed in competition with the *Rock Springs* case at the time wasn't controlling, nor should it be controlling. This is what I have in mind, the possibility of a more desirable alternative presenting itself."

"This is something I think that must be explored on this record." (Emphasis supplied).

To this, the Presiding Examiner (the same Presiding Examiner as in the PG&E proceedings) said (Tr. 118, July 12 1966):

"PRESIDING EXAMINER: I agree with you there..."

Under both judicial and Commission precedents, it is merely sufficient that a "more desirable alternative" be present to make its consideration relevant and material. Thus, in *City of Pittsburgh v. Federal Power Commission*, 237 F. 2d 741 (D. C. Cir., 1956) ("Little Inch" abandonment proceedings), the Commission refused to receive certain evidence in the record stating that "it had no jurisdiction to consider any alternatives to the specific proposal made by the applicant" (14 FPC at p. 50). The Court of Appeals reversed, however, stating (237 F. 2d, at p. 751):

"The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity. That the Commission has no authority to command the alternative does not mean that it cannot reject the proposal."

The application of this doctrine has been forcibly brought to the Commission's attention in the recent decision of the Court of Appeals in the *Consolidated Edison* case (*Scenic Hudson Pre-*

servation Conference, et al. vs. Federal Power Commission (Consolidated Edison Company of New York, Inc., Intervenor, 354 F.2d. 605 (December 29, 1965)). In that case, the Commission recognized that it "must compare the Cornwall project with any alternatives that are available." There is no doubt, the Court of Appeals said, that the Commission is under a statutory duty to give full consideration to alternative plans (citing *Michigan Consolidated Gas Co. vs. Federal Power Commission*, 283 F. 2d 204 224 - 226 (D. C. Cir., 1960), cert. denied 364 U.S. 913 (1960); *City of Pittsburgh v. Federal Power Commission*, 237 F. 2d 741 (D. C. Cir. 1956)). (354 F. 2d. at page 612 - 613; 617).

In the *Consolidated Edison* case, the Court criticized the testimony relied on by the Commission (as would be the case with the "offer of proof" of witness Hunsaker's testimony here), saying that it was "too scanty to meet the requirements of a full consideration of alternatives". There, as here, the Court remarked that "there was no significant attempt to develop evidence as to the . . . alternative" (354 F. 2d. at page 619, 620):

"Especially in a case of this type, where public interest and concern is so great, the Commission's refusal to receive the (Lurkis) testimony, as well as proffered information on fish protection devices and underground transmission facilities, exhibits a disregard of the statute and of judicial mandates instructing the Commission to probe all feasible alternatives."

* * * *

"In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

“This Court cannot and should not attempt to substitute its judgement for that of the Commission. But we must decide whether the Commission has correctly discharged its duties, including the proper fulfillment of its planning function in deciding that the ‘licensing of the project would be in the overall public interest’. The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts. See *Michigan Consolidated Gas Co. v. Federal Power Commission*, 283 F. 2d 204, 224, 226 (D. C. Cir.), cert. denied, 364 U.S. 913 (1960); *Isbrandtsen Co. v. United States*, 96 F. Supp. 883, 892 (S.D. N.Y. 1951), aff’d by an equally divided Court, 342 U.S. 950 (1952); Friendly, *The Federal Administrative Agencies*, 144 (1962); Landis, *The Administrative Process*, 36 - 46 (1938); cf. *City of Pittsburgh v. Federal Power Commission*. 237 F. 2d 741 (D.C. Cir. 1956).

As the Court in the *Consolidated Edison* case concluded, “the failure of the Commission to inform itself of these alternatives cannot be reconciled with its planning responsibility” (354 F. 2d at page 622). The same circumstances are apparent here.

SUMMARY AND CONCLUSION

In sum:

First, the Commission failed to consider Pacific Gas and Electric Company's estimated "cut backs" of California produced gas in order to provide a market for the proposed importation of Canadian gas.

PG&E's future forecasts of available California gas are completely unrealistic in ignoring any future discoveries of California gas after December 31, 1965.

In this regard, PG&E's methods of estimating available supplies of northern California gas are completely inconsistent with the methods for estimating available gas supplies used by PG&S's Canadian witnesses and by the Pacific Lighting Companies in southern California. In addition, all of PG&E's past estimates of available supplies of northern California gas have been completely unrealistic and unreliable as a basis for scheduling additional purchases of out-of-state gas.

In view of the fact that production and reserves of gas in northern California have consistently increased over the past 10 years based on the data of record in this proceeding, there is no basis for the Commission's finding that a "market exists" for the importation of the additional supply of natural gas by PG&E from Canada starting as early as November 1, 1966, as the Commission authorized in its decision (Finding (6), page 6; R. 5263).

Second, the Commission failed to adequately consider the availability of alternative supplies of natural gas from El Paso Natural Gas Company (or Transwestern Pipeline Company).

In this regard, additional supplies of El Paso gas are in fact available to PG&E without the construction of any additional out-of-state facilities. Not only would the actual delivered cost

of the additional El Paso and Transwestern gas be less than the estimated incremental cost of PG&E's additional proposed Canadian supplies, but under Commission precedents, it is sufficient that "a more desirable alternative" be present to make its consideration relevant and material.

Accordingly, in conclusion, it is the position of the California gas producers that the Commission decision in these proceedings must be set aside and new hearings ordered, in the light of:

- 1) The Commission's failure to consider Pacific Gas and Electric Company's (PG&E's) estimated "cut-backs" of California produced gas in order to provide a market for the proposed importation of Canadian gas.
- 2) The Commission's failure to adequately consider the availability of alternative supplies of natural gas from El Paso (and perhaps Transwestern).

Respectfully submitted,

HENRY F. LIPPITT, 2ND.,

Attorney for

California Gas Producers Association

*Independent Oil and Gas Producers
of California*

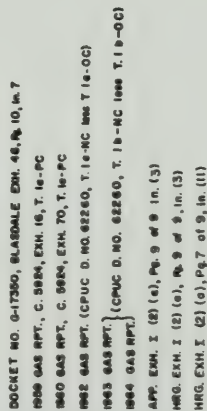
Jade Oil and Gas Company

December 12, 1966

626 Wilshire Boulevard

Los Angeles, California 90017

PACIFIC GAS AND ELECTRIC CO.



APPENDIX "A"

APPENDIX "C"

COMPARISON OF DELIVERED COST OF GAS TO PG&E AT CALIFORNIA BORDER

TOTAL COST OF GAS

	Canadian Gas	El Paso Gas	Difference
1964	33.56¢	29.74¢	3.82¢
1965	32.89¢	28.74¢	4.15¢
1966	32.39¢	28.00¢	4.39¢
1967	31.14¢	27.75¢	3.39¢
1968	30.96¢	27.75¢	3.21¢
1969	31.13¢	27.75¢	3.38¢
1970	31.11¢	27.75¢	3.36¢

INCREMENTAL COST OF GAS

1968	23.33¢	20.22¢	3.11¢
1969	24.03¢	20.22¢	3.81¢
1970	24.47¢	20.22¢	4.25¢

Transwestern Gas

1968	23.33¢	20.00¢	3.33¢
1969	24.03¢	20.00¢	4.03¢
1970	24.47¢	20.00¢	4.47¢

References:

Canadian gas: Blasdale, Ex. 19, page 4, lines 12, 24, 25 (R. 2413)

El Paso gas: 1964 - Rate Schedule G: Total Cost - 100% load factor price, Incremental Cost - Commodity Price.

1965 - After 1¢ per Mcf Permian Basin Area Rate decision reduction.

1966 - After ¾¢ per Mcf Tailored Supply Program reduction.

1967 - 1970 - After ¼¢ per Mcf additional Alternative Supply Proposal reduction.

Transwestern gas (Incremental only): 1965, Rate Schedule No. LX - after 1¢ per Mcf Permian Basin Area Rate decision reduction.

NO. 21313

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE STATE OF TEXAS,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

**BRIEF OF PETITIONER,
THE STATE OF TEXAS**

THE STATE OF TEXAS
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FILED

DEC 13 1966

WM. B. LUCK, CLERK

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In the
UNITED STATES COURT OF APPEALS
for the Ninth Circuit

No. 21313

Brief of Petitioner, the State of Texas
In Opposition to Federal Power Commission
Opinion No. 495
(And All Accompanying and Prior Orders
And Opinions Herein)

THE STATE OF TEXAS,

v.

Petitioner

FEDERAL POWER COMMISSION,

Respondent

I.

FACTS UPON WHICH JURISDICTION AND
VENUE ARE BASED

The captioned Opinion and orders upon which review are now sought are final orders under Sections 3 and 7 of the Natural Gas Act and under Executive Order No. 10485, dated September 3, 1963, by the Federal Power Commission, a duly constituted agency of the United States of America, having its principal offices at 411 "G" Street, N.W., Washington, D. C.

Petitioner, a party to the proceeding below in Docket Nos. CP 65-213, 214, 215 and dockets consolidated therewith, is aggrieved by the Commission Opinion and orders issued therein on December 17, 1965 and June 15 and August 4, 1966 in that such Opinion and orders are unlawful under and violative of the Natural Gas Act, the Administrative Procedure Act of

1946 and the Constitution of the United States. Petitioner filed a timely application for rehearing in accordance with the requirements of Section 19(a) of the Natural Gas Act which was denied by Commission action on August 4, 1966 under Section 19(a). This petition is filed within the time permitted and under procedures established by Section 19(b) of the Natural Gas Act. Jurisdiction, therefore, is in this Court under Section 19(b) of the Natural Gas Act.

This Court has jurisdiction of this appeal by virtue of Section 19(b) of the Natural Gas Act since Pacific Gas Transmission Company (PGT), a corporation organized and existing under the laws of the State of California, is "located" and has its principal place of business" in San Francisco and therefore within the territorial boundaries of the Ninth Judicial Circuit of the United States, PGT being the natural gas company to which the subject Opinion and orders under attack relate, and thus venue also is in this Court.

II.

STATEMENT OF THE CASE AND OF THE BASIC POSITION OF THIS PETITIONER

The State of Texas initially intervened in the captioned matter on or about February 12, 1965 for the purposes (1) of opposing the plan and application of PGT to import from Canada some 200,000,000 cubic feet of natural gas per day for delivery principally to the San Francisco Bay area and, to some extent, other parts of northern California, the result of which will create an undependable, unnecessary and inadvisable supply of imported gas in the area of northern California to the detriment of domestic producers, the na-

tional economy, California consumers, and the public in general, and (2) of suggesting for consideration herein a more desirable source of gas supply which presently exists as an alternative to the supply sought by PGT.

Originally, on August 5, 1960, the Federal Power Commission (Commission), after a hearing¹ in which any interested parties failed to intervene for the purposes of either offering opposition or presenting alternate proposals, authorized PGT to construct and operate a 614 mile section of a 1400 mile line of 36" pipe extending from the Canadian-United States border near Kingsgate, British Columbia to the Oregon-California border for the purpose of importing from Canada for sale to Pacific Gas & Electric Company (PG&E) a daily contract quantity of 415,000,000 cubic feet and a maximum daily demand of 454,000,000 cubic feet of natural gas, which construction amounted to \$116,940.00 (R: 2879).

By its application in the captioned matter filed with the Commission on January 12, 1965 (R: 3115-4236) and amended on March 1, 1965 (R: 4280-4335), PGT undertook to obtain additional authorization to install, construct, and utilize certain additional facilities necessary for the unprecedented importation from Canada of said 200,000,000 cubic feet of natural gas per day in the following manner: 100,000,000 cubic feet per day commencing November 1, 1966 and 100,000,000 cubic feet commencing November 1, 1967. The cost of such construction, as estimated by PGT, is \$13,857,000.00 (R: 2393-2408).

¹In the Matter of Pacific Gas Transmission Company, 24 FPC 134, August 5, 1960.

The aforementioned authorization sought herein by PGT was granted by the Commission in Opinion No. 495 dated June 15, 1966 (R: 5254-5263) (Appendix: 2-15), which affirmed the Presiding Examiner's Initial Decision (R: 4902-4929) (Appendix: 16-53) reached in disregard of the recommendations of the Commission's Staff to attach conditions (1) requiring the renegotiation of certain prices to be collected for gas by Canadian producers in order to protect the American consumers from price escalations and (2) requiring that any future supplies of natural gas for the PG&E market come from domestic sources so that a healthy balance may be maintained between foreign and domestic sources of natural gas supply and in further disregard of evidence in the record reflecting the availability of a more economic and desirable source of gas supply than the one proposed by PGT (R: 1219-1222).

More important, both the Presiding Examiner and the Commission refused to permit the State of Texas, as discussed in detail below, to present available evidence of a relevant and material nature showing in full and sufficient detail the existence of an alternate source of natural gas for consideration in connection with the application of PGT. Such evidence has never been allowed; and it is not now in the record, notwithstanding the continued insistence of the State of Texas that a lack of consideration of such evidence opens the door to an erroneous decision, which the State of Texas respectfully submits was herein reached simply because this record has never been and is not now complete.

The pre-hearing conference below was held on July 22, 1965; and formal hearing was commenced on September 15, 1965. During the course of the hearing, the

State of Texas undertook to offer prepared testimony of the witness, Bob R. Harris, and of the witness, Barry Hunsaker, together with certain exhibits, and to cause a subpoena duces tecum to issue requiring the presence of said witness, Barry Hunsaker, with certain documents and information therein called for (R: 4503-4513) (Appendix: 54-57), all of which would evidence the availability of an alternate supply of natural gas more desirable and economic than the supply proposed by Applicant; however, rulings by the Presiding Examiner excluded such evidence (R: 135-136, 139-140, 816-817) and refused the issuance of said subpoena duces tecum (R: 427-429, 816-817).

Since said Barry Hunsaker was at all times material hereto and is presently an employee of El Paso Natural Gas Company and never under control of or subject to command by the State of Texas, and since there was never any indication that said Barry Hunsaker would voluntarily appear, his presence as a witness herein could *only* have been obtained by the State of Texas through the subpoena process, which process was denied this State by the Presiding Examiner and by the Commission itself.

The testimony of this particular witness, Barry Hunsaker, for the purpose of developing the record to reflect the existence of a more desirable and economic supply of available gas than the supply proposed by PGT for consideration as an alternate source, is uniquely material and absolutely essential, as more fully stated hereinbelow.

Such evidence could not and cannot be obtained in any other manner. Without such evidence the record remains wanting and distorted.

Next, the State of Texas sought reversal of the aforementioned rulings of the Presiding Examiner by a motion directed to the Federal Power Commission under the Commission's Rules of Practice and Procedure (R: 4631-4637) (Appendix: 58-76) to "Reverse the Ruling of the Presiding Examiner and for Issuance of a Subpoena Duces Tecum," which motion, although filed by the Secretary of the Commission and made a part of the files (Appendix: 86), was after a considerable lapse of time, "rejected" by the Secretary without Commission consideration and summarily returned by the Secretary to the State of Texas (R: 4736 (Appendix: 77-78)).

Thereupon, the State of Texas applied again to the Commission, in accordance with the Commission's Rules of Practice and Procedure for "Reconsideration and for Waiver of the Commission's Rules if Necessary and Request for Commission Determination of the Question of Extraordinary Circumstances" (R: 4743-4749) (Appendix: 79-106, 107-108), which application provoked an order from the Commission dated December 17, 1965 denying reconsideration (R: 4890-4893) (Appendix 109-114), although the order itself recites as follows:

"Texas alleged that it could show through the presentation of this witness (Hunsaker) that there is an alternative method of supplying gas to California at a firm price and a cheaper price than the gas sought to be imported into California under the pending application" (R: 4891) (Appendix: 110).

Therefore, in spite of all legally available measures taken by the State of Texas to include its aforemen-

tioned relevant and material evidence in the record, this State was relegated to the use of what the Commission's Rules of Practice and Procedure refers to somewhat descriptively as an "Offer of Proof"—a tender which is hardly more than an "offer," since, because of its limited nature and incomplete coverage of what might have been relevant and material evidence, it is impossible for the Commission to fully consider its significance (R: 1567-1570). No meaningful evidence is likely to be "tendered" through the means of an "Offer of Proof" because of a total lack of the availability of cross-examination through such procedure.

Exceptions were duly filed by the State of Texas to the Opinion of the Presiding Examiner in the form of a brief as required by the Commission's Rules of Practice and Procedure (R: 4967-4973); and Opinion No. 495 (with accompanying orders) (R: 5254-5263) was issued by the Commission on June 15, 1966 affirming the Presiding Examiner in all particulars, including his rulings excluding the aforementioned evidence of the State of Texas and denying the issuance of the aforesaid subpoena duces tecum, and coincidentally stating in part that "the record in this case does not demonstrate that alternative methods exist for providing the needed volumes of additional gas at rates and under conditions more advantageous than those which will be achieved by certification of PGT's instant application" (R: 5259).

Subsequently, the State of Texas filed an Application for Rehearing (R:5264-5277); and the Commission Order denying application for rehearing issued on August 4, 1966 (R: 5315-5316) (Appendix: 115-117).

III.

SPECIFICATION OF POINTS OF ERROR

1. An inadequacy and unreliability of supply of foreign natural gas upon which PGT would depend are apparent from the record and have been ignored by the Commission.

2. The uncertainty of future prices of imported Canadian gas sought by PGT, resulting from uncontrollable factors without the boundaries and jurisdiction of the United States and by contracts with price escalation clauses, was largely disregarded by the Commission in reaching its Opinion.

3. *The Commission arrived at its Opinion and related orders without sufficient regard to or full consideration of a presently available, more economic and desirable, alternate supply of natural gas produced in Texas and moreover erroneously refused to even admit into the record relevant and material evidence reflecting the existence of such a supply of natural gas.*

4. The Opinion of the Commission was shaped throughout by unjustified emphasis on the original authorization of the subject project,² which was unfortunately never opposed by any party intervenor whatsoever and therefore never under the scrutiny of any opposing party in the proceeding.

5. The Commission failed to consider the undesirable effect upon the domestic economy and upon the development of the natural gas industry, which will result from approval of the subject application.

²In the Matter of Pacific Gas Transmission Company, Supra. Unfortunately never opposed by any party intervenor what-

IV.

ARGUMENT

1. The Supply of Foreign Natural Gas, Upon Which PGT Would Depend, Is Inadequate and Unreliable.

The record evidences a physical insufficiency of natural gas, upon which PGT would depend to meet its obligations under its application in this matter before the Commission.

One of PGT's own witnesses, J. Milton Wege, stated upon cross-examination that about the same number of wells as are presently in existence will have to be drilled in some of the Canadian fields in order to produce the deliverability required to secure sufficient gas for the expansion proposed herein by PGT over the next fifteen to twenty years (R: 198-200); and furthermore the evidence reflects that for the entire projects some 153 additional wells will have to be drilled during such time (R: 317).

In addition, no showing herein has ever been made by PGT of the maximum availability or deliverability of the proposed Canadian gas; and, in fact, the aforementioned witness for PGT, in spite of his verbal assurances, stated that he had made no such computation (R: 206).

With reference to the foregoing lack of evidence, PGT has merely undertaken to show that the average daily requirement necessary to meet the supply demands under the application proposed herein before the Commission is 681,900 Mcf. The indicated peaking requirements, over and above the average daily requirements, have been completely ignored (R: 210-212), and

concrete evidence reflecting the ability to meet such peaking requirements has never been made a part of the record. Yet, the contracts of PGT submitted with its application before the Commission provide for daily peak obligations of 110 percent to 120 percent, which obligations have been apparently overlooked in connection with PGT's deliverability study (R: 217-218).

An equally important consideration concerning the source of gas proposed by PGT is the political control of such gas by the Canadian government. The gas is under Canadian jurisdiction, and, as such, may be diverted by the Canadian government at any time in the event of Canadian national emergency or for the purpose of serving Canadian national interests. If such a development were to occur, neither PGT nor any of its associated companies nor the people of the San Francisco Bay area or of Northern California in general would have any recourse whatsoever. Such an intrinsic peril always exists with imported gas, and Canada's national interests do not and will not always necessarily coincide with those of the United States. When any densely populated community within the United States increases its proportionate dependence on foreign natural gas, which is subject to another government's police powers and laws, or when such increased dependence on foreign gas is thrust upon one of our densely populated areas, the potential danger of having such foreign gas supply cut off from that area or community at any time becomes increasingly important and far-reaching. The present uncertainty of supply may change to a certain shortage of natural gas beyond the ability of any domestic corporation, including PGT, to control, and the area or community depending upon

such foreign gas will suffer to the extent of the shortage (R: 1586-1587).

The possibility of action involving the natural gas industry on the part of the Canadian government in furtherance of the Canadian national interests and in complete disregard for repercussions from such action within the United States became a reality when the Canadian Prime Minister refused to approve proposed applications by Great Lakes Transmission Company, et al and Northern Natural Gas Company to construct certain pipelines and facilities through the United States to move Canadian natural gas into or through the United States and to supply eastern Canadian consumers with such gas or a like amount of gas from domestic sources,³ although at a later date such decision was retracted in accordance with apparent advices.

By reaching the decision to refuse the aforesaid projects, the Prime Minister reversed the Canadian National Energy Board and in effect rendered moot hearings before the Federal Power Commission, which, subsequent to the decision of the Canadian National Energy Board, had been fully completed and had been based on months of legal, engineering, and public relations work within the United States. In reaching the decision to refuse the aforesaid projects, the Prime Minister overtly stated that he was protecting "Canadian interests."

As a result of the aforesaid actions of the Canadian National Energy Board and the Canadian Prime Min-

³In the Matter of Great Lakes Gas Transmission Company, et al, Docket Nos. CP66-110 et al, before the Federal Power Commission.

ister, interested parties may well wonder if the final decision of the Canadian government concerning such matters has in fact been reached, and any prudent party may well have reservations concerning the expenditure of substantial funds for additional pipeline facilities based thereon.

The State of Texas submits that importation of gas from Canada will be judged in the same light by the Canadian Prime Minister and certain segments of the Canadian government, and Canadian gas will be made available only under terms that best serve the interests of Canada and only so long as the best interests of Canada are served.

Arguments herein made by the State of Texas are not under any circumstances to be regarded as questioning the friendly relationship existing between Canada and the United States of America. This State merely submits that a supply of natural gas emanating from a source under foreign jurisdiction is inevitably subject to the necessities and future requirements of such foreign country as determined by its government. Therefore, a supply of gas is more reliable and certain if its source is located within an area that is generally under the consumer's political control and certainly not under the control of a government in which the chief of state has already overruled the agency responsible for natural gas regulation and thereby raised the questions of whether such agency has ceased to be a decision making body and whether there will be any continuity of such agency's policies and rules of procedure.

The Commission failed and refused to even consider the inadequacy and unreliability of PGT's foreign gas

supply, as evidenced by the following portion of the Commission opinion, to-wit:

“The arguments that have been made as to the inadequacy of the Canadian gas supplies, while they would be relevant to a determination of whether a new pipeline should be built, are not appropriate where existing pipeline facilities will be utilized to make delivery of the gas.” (R: 5259) Appendix 7).

From the foregoing language in the opinion, the Commission appears to consider the question of inadequacy of supply irrelevant to a proceeding involving the importation of *any* amounts of natural gas through *existing facilities*.

The State of Texas submits that the questions of inadequacy and unreliability of supply of foreign natural gas are as important in proceedings involving existing pipelines as they are in proceedings involving proposed pipelines. New facilities must be built in either situation. The dangers and imponderables of an inadequate and/or unreliable foreign source of natural gas are present whether gas is imported through a new line or an old line with added facilities; and such dangers and imponderables are just as easily felt by a vulnerable consumer of natural gas whether the gas is to be transported through proposed or existing pipe.

The State of Texas submits that the questions of inadequacy and unreliability of imported gas are most important in any proceeding before the Commission and are indeed relevant and material at all times.

2. Future Prices of Imported Natural Gas Upon Which PGT Would Depend Are Uncertain Because of Factors Without the Boundaries and the Jurisdiction of the United States, Over Which Neither PGT nor the United States Government has Control.

The uncertainty of future prices of the Canadian natural gas proposed for importation by PGT is abundantly evident in the record.

In the first place, there is no evidence in these proceedings of the cost of installations required in Canada under the proposal of PGT, nor is there any evidence in the record with respect to delivery costs north of the Canadian border. An apparent conclusion was reached by PGT that a presentation before the Commission of engineering data north of the United States-Canadian border would be "irrelevant and immaterial (R: 285-290), notwithstanding the established precedent of placing such evidence of complete facilities in the record so that a decision can be based on the entire proposed project without a considerable void in the presentation. The consideration of PGT's proposal without the aforementioned evidence is by nature blind to the extent of the failure of PGT to include such evidence and, the State of Texas submits, has resulted in an improper decision provoked by an incomplete record.

With reference to the evidence actually presented, a price uncertainty of the Canadian gas sought by PGT admittedly exists. The record reflects that the vast majority of the gas contracts proposed before the Commission by PGT contain a renegotiation provision for

the price of gas as early as 1968, and at periodic intervals thereafter (R: 442-444). Such a provision, if not indicative of a price increase, is certainly permissive of one.

At least 86 percent of the gas purchase contracts, upon which PGT relies for its supply, will be renegotiated in 1968, and in addition, a periodic escalation of .25 cents per Mcf is called for by the contracts (R: 468-472). Price escalation clauses cover about 46 percent of the gas involved (R: 468-472).

Based on the record in these proceedings, probable price increases under PGT's gas purchase contracts and periodic escalations of price all but do away with any certainty of price of Canadian gas (R: 1546-1547). Furthermore, based on PGT's "postage Stamp" policy and its weighted average contract price clause, a material increase in price of all the imported gas upon which PGT expects to depend is possible (R: 470-471) if not probable.

A double standard will emerge for pricing of gas sold in the United States if the Commission order granting PGT's application is permitted to stand. While the price of domestic gas is firmly set by governmental control and supervision, the price of Canadian gas imported into this country is free to fluctuate and thereby increase in accordance with various renegotiated provisions and weighted average clauses of gas purchase contracts and under so-called "postage stamp" policies.

The Commission's staff has repeatedly pointed out that Canadian gas is not subject to the same controls that are applied in the United States; and in this pro-

ceeding the Commission's staff urged the Commission to attach a condition to its order requiring renegotiation of prices to be collected for gas by Canadian producers in order to protect the American consumers from price escalation, as reflected on pages 29-33 of the Brief of Commission Staff filed herein on November 15, 1965.

The Commission, after recognizing the Commission staff's position that the certificates should be "conditioned to require that Canadian producers supplying the gas to Canadian pipelines for transportation on a cost-of-service basis to PGT should submit to renegotiation of their contracts to eliminate price escalation provisions (based on weighted average field prices) for protection against possible price increases which would increase the cost of gas to PGT and, ultimately, the American consumer" (R: 5260) (Appendix 10), stated in its order that "such condition was not imposed when the present pipeline facilities were authorized" (R: 5260) (Appendix: 10) and that, since a smaller percentage of contracts now contain such admittedly noxious provisions, the Commission Staff's suggested condition should not be included in the Commission order (R: 5261) (Appendix: 11).

The State of Texas submits that if a provision in a gas purchase contract is detrimental to the consumer, it will still be detrimental to the consumer whether such a gas purchase contract covers 98 percent or 46 percent—or any substantial percentage—of the gas reserves upon which the consumer is forced to depend.

Finally, the Commission, in order to apparently strengthen its order, states, "To require renegotiation of the producer's contracts, which we cannot directly

control, might result in delay in obtaining the desired supplies of gas'' (R: 5261) (Appendix: 11). The State of Texas merely states that, on the other hand, such a requirement might not result in delay; and, if it should, the small inconvenience, if any, of such delay would be far outweighed by the future and widespread advantages of low and certain gas prices available to a major United States market.

It follows that the uncontrolled price movement afforded foreign gas within an otherwise firmly regulated domestic gas industry is conducive to and, in all probability, will result in price increases of all imported gas, which will ultimately and inevitably reach the captive consumers thereof.

3. The Commission Arrived at its Opinion and Related Orders without Sufficient Regard to or Full Consideration of a Presently Available, More Economic and Desirable, Alternate Supply of Natural Gas Produced in Texas and Moreover, Erroneously Refused to Even Admit into the Record Relevant and Material Evidence Reflecting the Existence of Such a Supply of Natural Gas.

The State of Texas has unsuccessfully undertaken to propose for consideration, in connection with PGT's application before the Commission, an existing alternate and more desirable supply of natural gas for use by the Northern California market.

The State of Texas has been unsuccessful in such endeavor because both the Presiding Examiner and the Federal Power Commission have refused to permit the presentation of such evidence by this State (R: 136, 140; R: 4890-4893).

The evidence, which the State of Texas desires to present and has continually attempted to place in the record, would show an alternate and more desirable supply of gas from Texas (where there are presently over 700 shut-in gas wells) available to PG&E (through existing facilities of El Paso Natural Gas Company) in a sufficient volume to fulfill PG&E's requirements for gas sought to be supplied by PGT from Canadian sources and at a lower border price at the California border than the price of Canadian gas sought under the application by PGT. Such is the nature of the existing alternate supply of natural gas proposed by the State of Texas for consideration throughout these proceedings, the evidence of which has been arbitrarily excluded from the record by the Commission, notwithstanding the attempted tenders of such evidence at every available juncture and in every legal manner by this State (R: 136, 140, 427-429, 810-812, 816-817, 4631-4636, 4733, 4736, 4739, 4743-4767, 4890-4893, 4964-4966, 4978-4995, 5270-5279).

Notwithstanding such continuous urging and numerous legal methods employed by the State of Texas throughout the hearing of this matter before the Presiding Examiner and within the framework of the Commission's Rules of Practice and Procedure to incorporate its evidence into the record, the Presiding Examiner, before whom this matter was originally heard, subsequently referred to such attempts on the part of this State as "half-hearted" in the following manner:

"Some of you may recall that there were half-hearted alternate proposals submitted to the Examiner in the Pacific Gas Transmission import case, but they didn't do anything except to say there were shut-in wells in Texas. I think people

in the industry know pretty well why wells are shut in and not attached to the pipeline, so the Examiner didn't admit that.”³

And the Commission itself concluded in its opinion, after upholding the Presiding Examiner's exclusion of evidence proposed by this State, that “the record in this case does not demonstrate that alternate methods exist for providing the needed volumes of additional gas at rates and under conditions more advantageous than those which will be achieved by certification of PGT's instant application” (R: 5259) (Appendix 8).

The State of Texas wholeheartedly agrees with the foregoing statement of the Commission; however, the State of Texas must readily add that the record would have reflected *for the Commission* the existence of a more desirable alternate method “for providing the needed volumes of additional gas at rates and under conditions more advantageous than those which will be achieved by certification of PGT's instant application” *if* the State of Texas had been permitted to introduce its said proposed evidence into the record—*if* the record had been permitted to be completed so as to include *all* relevant and material evidence—all of which the Presiding Examiner and the Commission itself failed and refused to allow.

The State of Texas respectfully calls the Court's attention not only to the prepared testimony of its proposed witnesses, Bob R. Harris and Barry Hunsaker, together with certain exhibits offered in connection

³In the Matter of El Paso Natural Gas Company, Docket Nos. G-8932 and CP66-315, Before the Federal Power Commission: Vol. No. 13, Page 1862 of the transcript.

therewith (R: 2906-2907, 2915-2919, 2920-2927, 2927A, 2928-2933, 2934-3036), but also to the prepared testimony of Arlen Edgar offered by Permian Basin Petroleum Association, et al (R: 2896-2904), and the prepared testimony of F. X. Jordan with accompanying exhibits offered by Independent Petroleum Association of America (R: 3037-3039), all of which testimony bears directly upon either the presence of an alternate supply of gas more desirable than the supply proposed by PGT or upon the relative undesirability of the foreign gas proposed by PGT, and none of which testimony has ever been permitted to be in the record as evidence but merely as offers of proof, although as relevant and material as any evidence presently included in the record.

In advocating an available gas supply in the United States as a more desirable source than foreign gas, it should first be remembered that natural gas in this country is not subject to any political control by or change of policy within any foreign government, as is the imported gas sought under PGT's application herein before the Commission. Such a fact in itself weighs heavily in favor of domestic supply for one of this country's major metropolitan areas.

Other noticeable advantages of available gas produced in Texas contrast sharply with the unreliability of supply and uncertainty of price of the foreign gas sought for importation by PGT.

Where the price of the proposed Canadian gas is uncertain as aforesaid, the price of available natural gas produced in Texas and moving in interstate commerce is regulated by the Federal Power Commission

in such a manner that its price is firm and definite in each field or area, which is particularly true of the price of gas produced in the Permian Basin area of Texas and New Mexico for supply to the West Coast market (R: 1548). *The testimony of PGT's own witness herein reflects that the incremental price of such available "Texas" gas at the California border (Topock) is approximately 22¢ per Mcf, which is a cheaper price than even the original incremental price of PGT's proposed imported gas at the California border* (R: 1219-1222). With reference to a showing of the lowest price for available, desirable gas, the Supreme Court of the United States held as follows:

"The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas (citing Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333, 1944). As the original Section 7(c) provided, it was 'the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the *lowest possible reasonable rate* consistent with the maintenance of adequate service in the public interest.' (52 Stat. 825⁵) The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges. The heart of the Act is found in those provisions requiring initially that any 'proposed service, sale, operation, construction, extension or acquisition . . . will be required

⁵The 1942 amendments to Section 7, 56 Stat. 83, were not intended to change this declaration of purpose. See hearings, House Interstate and Foreign Commerce Committee, on H. R. 5249, 77th Congress, First Session 18-19; H.R. Rep. No. 1290, 77th Cong., First Sess.; S.Rep. No. 948, 77th Cong., Second Sess.

by the present or future public convenience and necessity,' (Sec. 7(e), 15 U.S.C. Sec. 717f(e)), 15 U.S.C.A. Sec. 717f(e) and that all rates and charges 'made, demanded or received' shall be 'just and reasonable,' (Sec. 4, 15 U.S.C. Sec. 717c, 15 U.S.C.A. Sec. 717c)." (Emphasis added) Atlantic Refining Co., et al. v. Public Service Commission of State of New York, et al., 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed.2d 1312 (6/22/59).

Where the supply of the proposed Canadian gas is unreliable as aforesaid, the supply through El Paso Natural Gas Company lines of gas produced in Texas is available and reliable, consideration of which supply by the Presiding Examiner and the Commission has been consistently sought by the State of Texas as mentioned hereinabove, although evidence of such alternate supply has been disallowed in these proceedings, excluded from the record, and relegated to what the Commission's Rules of Practice and Procedure refers to as an "Offer of Proof"—a wholly unsatisfactory procedure limited by its nature to inadequate written evidence, under which no oral examination, *including cross-examination*, can be made and no documents can be produced for consideration through the use of the subpoena process (R: 1567-1579).

PGT has objected throughout the hearing to any consideration of an alternate supply of gas from Texas because no competitive application has been filed by El Paso Natural Gas Company, through the lines of which such Texas gas would have to be supplied to the California market; however, although counsel for El Paso Natural Gas Company has indicated that the company may have had no "excess capacity" in its lines without adding additional facilities at a certain

time, by virtue of which it could make deliveries, El Paso Natural Gas Company did intervene as a party in this proceeding and has maintained a completely neutral position herein and has never objected in any manner to the possibility of carrying additional gas to the California market. The relatively minor cost of additional facilities to the existing lines of El Paso Natural Gas Company has never been set forth in this record. Furthermore, the term "excess capacity," has never been defined in this hearing, and no determination has been made herein as to the context in which the term was used.

Moreover, in the original application in the Gulf Pacific case,⁶ El Paso Natural Gas Company showed therein that it could deliver an additional 250,000 Mcf per day to the California border by reinforcing its existing facilities from Texas and, in a first amended application, alternatively showed therein that it could deliver 575,000 Mcf per day to the California border via a proposed new pipeline from New Mexico (known as the "Chaco-Needles Line"), as well as the aforementioned 250,000 Mcf per day by reinforcement of existing facilities (R: 426-427). Furthermore, Mr. Barry Hunsaker, then Chief Pipeline Engineer for El Paso Natural Gas Company, testified that, at the request of the Southern California Distributor Companies, he had prepared exhibits demonstrating another alternative, by virtue of which El Paso Natural Gas Company could deliver to the California border 250,000 Mcf per day heretofore mentioned plus an additional 325,000 Mcf per day making a total of 575,000

⁶Matters of Gulf Pacific Pipeline Co., et al, Docket Nos. CP63-223, et al, before the Federal Power Commission.

Mcf per day merely by reinforcing its existing pipelines (without constructing the "Chaco-Needles Line") (R: 413-415). Since El Paso Natural Gas Company did not make application to deliver this additional 325,000 Mcf per day through its existing pipelines, this alternative is as available for consideration by the Commission today as it was when the said testimony and exhibits of Mr. Barry Hunsaker were prepared, notwithstanding the final or any decision in the Gulf Pacific case (R: 427). Said testimony and exhibits of Mr. Barry Hunsaker were never sought to be used in the Gulf Pacific case or in support of any pending application before the Federal Power Commission. Said testimony and exhibits of Mr. Barry Hunsaker were the substance of the evidence tendered in this proceeding by this State and were arbitrarily and capriciously excluded from this record by the Presiding examiner and subsequently by the Commission itself.

Not only are the said testimony and exhibits of Mr. Barry Hunsaker highly relevant and material in the matters here under consideration, but also their admission into the record herein as evidence, as requested by the State of Texas, is in keeping with the holdings in *City of Pittsburgh v. Federal Power Commission*, 237 F.2d 741 (Cir.Ct.App., D.C., 1956) and the "Rock Springs" case (30 F.P.C. 77, 1963), that the Commission should consider *all* alternative means to determine whether a particular proposal would serve the public convenience and necessity, regardless of whether a formal application or competitive application is made with reference to such proposal.

In the above mentioned *City of Pittsburgh case*, the

District of Columbia Circuit Court of Appeals set forth the following rule:

“The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity. That the Commission has no authority to command the alternative does not mean that it cannot reject the (original) proposal” *City of Pittsburgh v. Federal Power Commission* (Supra).

Furthermore, such a rule has been subsequently followed by the United States Court of Appeals for the Second Circuit, as evidenced by its opinion declaring that a project under consideration by the Commission must be compared with any alternatives that are available and the following statements from such opinion:

“... the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it: the right of the public must receive active and affirmative protection at the hands of the Commission.”

“The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts” *Scenic Hudson Preservation Conference, et al. v. Federal Power Commission*, 534 F.2d 608 (Cir.Ct.App., Second Cir., 1965).

Also, the United States Court of Appeals for the District of Columbia has similarly held as follows:

“... since the Commission is charged with the duty of protecting the ultimate consumer from ‘exploitation at the hands of natural gas companies’

(citing Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591, 64 S.Ct. 281, 88 L.ed. 333, 1944), it cannot refuse *to consider* a proposal which appears, on its face at least, consistent with that duty." Michigan Consolidated Gas Company v. Federal Power Commission, 283 F.2d 204 (Cir.Ct.App., D.C., 4/29/60, reh.den. 7/11/60, cert.den. 364 U.S. 913, 1960).

Moreover, Staff Counsel of the Federal Power Commission has also clearly stated its position (in a direct answer to the same Presiding Examiner herein in a subsequent matter before the Commission) with reference to the consideration by the Commission of *all* reasonable alternatives to the proposals of applicants before the Commission, to wit:

"We are hopeful that alternatives will be presented in this record, whether they are better alternatives or poorer alternatives, simply to give an idea to the Commission whether or not there is a better way to perform the service to the Northwest other than the picking up of this high-cost Canadian gas.

"We are concerned at the price of this gas, and we are concerned at the forthcoming dependence on the Pacific Northwest area on Canadian reserves for their future market development. We are concerned, of course, with all of the questions the Commission has raised. We intend to explore them thoroughly.

"It may be I.P.A.A., TIPRO or Texas or anyone else can come in and show gas is available and there are means to move it up to the Pacific Northwest area, which of itself, and notwithstanding that no certificate application has been submitted, would be a possible alternative which should be explored.

"If your Honor will recall for example in the Rock Springs case of recent infamy, the Commission denied a certificate to El Paso when it was shown on the record through statements of various parties there might be better alternatives, as admitted you remember by the parties themselves subsequently. The fact no certificate was filed in competition with the Rock Springs case at the time wasn't controlling, nor should it be controlling. This is what I have in mind, the possibility of a more desirable alternative presenting itself.

"This is something I think that must be explored on this record.

"To the extent these alternatives have been explored, your Honor, I would expect they would tell us what alternatives were explored. El Paso has done this to some extent with the first supplement to their original application. They presented alternatives which were explored and which they say are much more expensive than the proposal. Something of this type should be presented so that the Commission has an awareness of what the alternatives might be, so that the consumers in the Pacific Northwest have an awareness of what the alternatives might be, and where they are leading themselves by depending on Canadian gas.

"The dependence upon Canadian gas of itself may not be bad, but we are concerned that the Pacific Northwest consumers might be put into a position that ultimately they will be paying too much for gas that otherwise would have been available to them if they had acted earlier in bringing gas up from other sources. This is something that should be explored, . . ."

Apparently, from the void in the record, to which

⁷In the Matter of El Paso Natural Gas Company, *supra*: Vol. 1, Pages 115-118 of the transcript.

the excluded evidence proposed by the State of Texas was intended by this State to fill, the Commission determined that, although supplies of gas are available in the Permian Basin and other areas of the Southwest, "the facilities for bringing this gas to California in the amounts desired by consumers are not now available, nor can they be available for some time" (R: 5260) (Appendix 9). This State says that a different conclusion would have been reached if its proposed evidence had not been excluded from this record.

Evidence has been placed in this record that El Paso Natural Gas Company can furnish desirable natural gas to the Northern California market at a lower California border price than that of the foreign gas proposed by PGT. The State of Texas should be permitted to make a showing *that there is in fact a presently existing, alternate supply of natural gas available to the Northern California market, which is more desirable and may be produced at a lower price than the imported gas herein proposed.* Such a showing of evidence should be permitted in this matter, especially since the testimony proposed by the State of Texas (together with the oral examination in connection therewith) may reflect that El Paso Natural Gas Company can presently supply Northern California with such available gas and is desirous of so serving the Northern California market. As is stated by the Court in the *Hudson River case*:

"If the Commission is properly to discharge its duty . . . ; the record on which it bases its determination must be complete. The petitioners *and the public at large* have the right to demand this completeness." (Emphasis added)

Scenic Hudson Preservation Conference, et al. v. Federal Power Commission, supra.

In the initial decision affirmed in due course by the Commission, the Presiding Examiner undertook to discuss the economic feasibility of the proposed project (R: 1919-1920); however, due to the exclusion of proposed testimony of the State of Texas, the entire picture could not be presented, as no evidence was permitted in the record, upon which an economic comparison could be made with natural gas produced in Texas. Yet, the evidence, as the record presently stands and as mentioned hereinabove, clearly reflects the presence of a lower incremental cost of Texas gas at the California border than the corresponding incremental cost of the proposed foreign gas at the California border; and the State of Texas submits that, if the record had been completed with respect to its proposed testimony, a showing of a lower future price for Texas gas with less expenditure for physical facilities would also be a part of the existing record.

Not only was the State of Texas denied the right by the Presiding Examiner and the Commission to present as a part of the record herein the highly relevant and material prepared testimony of said Bob R. Harris and Barry Hunsaker, but also, because of the refusal of the Presiding Examiner and the Commission to permit the issuance of the aforementioned subpoena duces tecum directed to Barry Hunsaker, the State of Texas was further and cursorily denied its inherent right to due process of law as guaranteed by the Fifth Amendment of the United States Con-

stitution⁸ and as provided in the Federal Administrative Procedure Act.⁹

With reference to the right of a party to use of the subpoena process, the Federal Administrative Procedure Act provides:

“Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought.” 5 U.S.C.A., Sec. 1005 (c).

Furthermore, with reference to the right of a party to present all pertinent facts to the Commission for consideration, the Federal Administrative Procedure Act provides the following:

“The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permits, . . .” 5 U.S.C.A., Sec. 1004 (b).

The State of Texas was denied the right by the Presiding Examiner and by the Commission to present certain testimony of said Barry Hunsaker, which was prepared but not used in connection with a prior hearing before the Commission, and moreover was denied the right to command his presence at this hearing, with certain documents and information, in order to prove up the aforementioned particular matters concerning the availability of a more desirable, alternate supply of natural gas than the supply proposed by PGT.

⁸U.S.C.A., Const. Amend. 5.

⁹5 U.S.C.A., Sec. 1001, et seq.

This particular witness, Barry Hunsaker, is and has been at all times material hereto an employee of El Paso Natural Gas Company and as such under no duty to appear on behalf of the State of Texas. Never did he voluntarily appear herein during the course of these proceedings, although his presence was requested by this State. The only possible way that the oral testimony of Barry Hunsaker on behalf of the State of Texas could presently be a part of the record would have been for his presence to be ordered by subpoena emanating from the Commission. The only possible way that a showing of the availability of a more desirable, alternate supply of natural gas than the supply proposed by PGT could presently be a part of the record would have been through the oral testimony of Barry Hunsaker, since his proposed written testimony was prepared for a prior hearing and his oral testimony was essential to make a showing in this record that the aforesaid more desirable, alternate supply of natural gas exists today and since said Barry Hunsaker is uniquely qualified to present such testimony because of his particular position with and the specific studies he has made for El Paso Natural Gas Company. Therefore, the refusal on the part of the Presiding Examiner and the Commission to issue a subpoena duces tecum, as requested by the State of Texas, requiring Barry Hunsaker to testify herein was a denial to the State of Texas of due process of law, was unconstitutional and capricious.

The Courts have consistently protected party litigants from such abuses of denial of due process, as evidenced by the following statement appearing in a holding by the District of Columbia Circuit Court of Appeals:

“That the procedural necessities include the revelation of the evidence upon which the disputed order is based, an opportunity to explore that evidence, and a conclusion based upon reason and not merely arbitrary, is soundly established by a long line of cases.” *Jordan, Superintendent of Insurance v. American Eagle Fire Insurance Co., et al.*, 169 F.2d 281 (Cir.Ct.App., D.C., 4-12-48)

Furthermore, a court decision has specifically dealt with a possible denial of due process by refusal to issue a subpoena duces tecum. In that particular case, the Court upheld the Federal Trade Commission’s denial of the issuance of a subpoena duces tecum simply because such subpoena was “too sweeping in its terms to be regarded as reasonable” and because the “petitioners (had already) received all the information to which they were entitled” but the court left no question as to the importance with which it regarded such a possible denial of due process:

“The most serious contentions raised by petitioners are that they were not accorded a full and fair hearing and were denied due process (1) because they were not furnished the particulars of the charge as to discrimination, and (2) *because they were not granted a subpoena duces tecum as prayed.*” (Emphasis added.)

The Court thereupon stated as follows in its opinion:

“The right to a full and fair hearing is one of the substantial rights of a litigant, constituting one of ‘the rudiments of fair play.’ ”

Such a right, the court stated, includes, “the right to present evidence.” *Mueller and Co., et al. v. F.T.C.*, 142 F.2d 511 (Cir.Ct.App., Sixth Cir., 4-13-44).

Again, the right to a full hearing was firmly stated by the Third Circuit Court of Appeals in a case involving the Federal Power Commission itself, in the following manner:

“The parties to a proceeding before an administrative agency such as the Commission are entitled to: first, due notice as to the nature and scope of the contemplated inquiry; second, *an opportunity to be heard and present evidence*; and third, *a full hearing in conformity with the fundamental concepts of fairness. A departure from these minimal requirements is a denial of procedural due process. . . .*” (Emphasis added) *Superior Oil Co. v. Federal Power Commission*, 334 F.2d 1002 (Cir.Ct.App., Third Cir., 7-30-64).

The State of Texas submits that the San Francisco Bay area and all of Northern California will best be served by the presently available natural gas produced in Texas and consequently that the Northern California market should not at this time be subjected to any greater dependence on the less desirable and more costly foreign gas proposed for importation by PGT.

The State of Texas submits that, if its witness had been permitted to testify and to be available for cross-examination, the record in these proceedings would have been supported by overwhelming evidence confirming this State's position as a party herein and substantiating the record established herein that a dependable natural gas supply for the Northern California market is presently available in Texas, which can be transported to the California border through existing facilities and can be sold there at a firm price and a price lower than the price of the relatively unreliable foreign gas proposed for importation by PGT.

4. The Opinion of the Commission was Shaped Throughout by Unjustified Emphasis on the Original Authorization of the Subject Project,¹⁰ which was Unfortunately Never Opposed by any Party Intervenor Whatsoever and Therefore Never Under the Scrutiny of any Opposing Party in the Proceeding.

The first paragraph of the Presiding Examiner's Initial Decision, which was duly affirmed by the Commission, refers to a footnote citing the original authorization of Pacific Gas Transmission Company to construct and operate the basic facilities, which are proposed for use herein, and the following statement appears in such footnote:

“The various regulatory agencies recognized, when they authorized the construction and operation of this 36-inch line, that it was oversized for the throughput of the initially certificated volumes of 415,000 Mcf per day. However, PGT there indicated that future authorizations would be sought to import additional volumes of natural gas to utilize the full capacity of the line” (R: 1903).

Furthermore, in said Initial Decision, the following statement appears:

“In this proceeding the applicant seeks to take advantage of this additional throughput capacity” (R: 1917).

Following the aforesaid comments, the Presiding Examiner observed that the increased volumes of gas will materially decrease the delivered unit price of gas (R: 1917).

¹⁰In the matter of Pacific Gas Transmission Company, *supra*.

In the original proceeding in which authorization for a 36-inch pipeline was granted by the "various regulatory agencies," no objection was made to the oversized pipeline as proposed by PGT, primarily because any interested parties had inadvertently failed to intervene in opposition to such application. Therefore, the adversary system was not at such time evoked, and an airing of all facts—favorable and unfavorable—which opposition at a hearing would elicit, was never fully made. A question exists as to whether such oversized pipeline would have been authorized on August 5, 1960, if the application and plan of PGT therein had in fact been opposed.

Nevertheless, no more can be assumed than that PGT indicated in said hearing "that future authorizations would be sought to import additional volumes of natural gas to utilize the full capacity of the line." Surely, it cannot be assumed that the Federal Power Commission, by granting the original application, thereby concluded that all future applications by PGT regarding additional utilization of such pipeline would be granted at any and all times without question.

The State of Texas says that such assumption was never intended; that this is not the time to permit additional importation of gas into the Northern California area; and that any economic advantage of a presently oversized pipeline in this instance is far outweighed by the disadvantages of (1) inadequacy of supply, (2) uncertainty of price, (3) unnecessary dependence on foreign gas, and (4) relatively high costs when compared with an available, alternate, domestic supply, all of which disadvantages, as discussed here-

inabove, are inherent in the proposal of PGT in the captioned proceedings.

The Commission, in its issuing opinion, stated that it was concerned here with "already existing pipeline facilities which are not yet being utilized to their full-est capacity" (R: 5260), and further stated, "to re-fuse to issue certificates authorizing the importation, transportation, and sale of this additional gas would mean that some of the capacity of presently existing facilities would remain unused with resultant higher costs to the consumers in four states" (R: 5260). Then the Commission added, ". . . it would seem desirable to allow already existing facilities to be used to bring out whatever gas may be available" (R: 2560). The excluded evidence herein proposed by the State of Texas, as referred to herein, is also concerned with the utilization of existing pipeline facilities, with the consumer costs in connection therewith, and with the desirability of allowing already existing facilities to be used to bring out whatever gas may be available from Texas.

The Federal Power Commission's Staff, after a per-usal of the evidence submitted at the original hearing in this matter, recognized the factors of inadequate supply, uncertain price, unnecessary dependence on foreign gas, and relatively high costs of Canadian gas with reference to PGT's application, as reflected by the detailed Staff Brief dated November 15, 1965 previously filed herein, in which Staff discussed the possibility of price increases of gas under the proposed application on pages 33 through 35 thereof, the lower price of gas available through the lines of El Paso Natural Gas Company than the price of foreign gas

proposed by PGT on pages 35 through 39 thereof, and the need for augmenting PG&E's gas supply with gas from domestic sources to the degree necessary for protection of the domestic industry and the domestic gas supply for the United States consumer on pages 45 through 49 thereof.

The State of Texas is also concerned with the foregoing matters and firmly believes such concern is necessarily provoked and indeed made more urgent by the ramifications of granting PGT's application in this case.

5. The Commission Failed to Consider the Undesirable Effect Upon the Domestic Economy and the Development of the Natural Gas Industry, Which Will Result From Approval of the Subject Application.

Since the volumes of imported gas sought from Canada in this proceeding are of such a magnitude, the effect upon the domestic economy and the development of the domestic natural gas industry should be thoroughly determined in connection with any consideration of approval of the subject application. To some extent, the record reflects what may be expected if an additional volume of 200,000 Mcf per day of gas is imported into the Northern California market, as proposed by PGT.

The testimony of Mr. F. X. Jordan, Economic Analyst of the Independent Petroleum Association of America, shows definitely that interstate movements of natural gas into California have been adversely affected by the great amounts of imported gas flowing into California in the last few years. Based upon Mr. Jordan's factual analysis, imported gas from Canada

in such increasingly large volumes has had a demonstrably depressant effect on utilization of domestic gas; and, if such a trend continues in the future, the volumes of imported gas flowing into this country will tend to discourage domestic natural gas exploration and thereby eliminate a dependable and healthy domestic supply (R: 1578-1580).

Mr. Jordan has further pointed out that during the past five years, the marketed production of domestic natural gas has increased 29% while natural gas imports into the United States have increased 230%; and that, where imported natural gas accounted for 2.7% of overall United States supply in 1964, imported gas in District V (California District) during 1964 constituted 13.5% of the total natural gas supply (R: 1583).

As an expert witness, Mr. Jordan has stated that gas imports should be permitted to increase but at a rate no greater than the growth rate of the domestic production of natural gas in order to maintain a healthy and vigorous domestic petroleum industry (R: 1587-158).

The State of Texas submits that the health and vigor of the domestic petroleum industry are most important to the economy of the nation and that granting PGT's application to import the volumes of gas requested in this proceeding into the Northern California area is equivalent to arbitrarily denying the domestic petroleum industry the encouragement toward health and vigor that it could otherwise have and presently needs.

A wider view of economic repercussions, which would stem from the importation of the great volume of gas,

proposed by PGT and approved by the Commission herein, will expose a resulting deterioration in balance of payments and the alarming possibility of a considerable gold flow out of this country. A showing may be made by simple arithmetic that some \$1,000,000. per month would move from the United States to Canada in payment for the imported gas sought herein by PGT. The State of Texas submits that such adverse economic effect should also be considered with reference to the granting of PGT's application in this matter, especially because of the present importance of a favorable balance of trade position.

V.

CONCLUSION

The State of Texas respectfully submits that, based upon the evidence alone in this matter and bolstered by its offers of proof, the public convenience and necessity would not be served by issuance of the requested certificate approved herein by the Commission; the issuance of a Presidential Permit and Order authorizing the requested importation of gas, which the State of Texas feels is a necessary requirement to any approval of the subject application herein, would be inconsistent with and detrimental to the public interest; that therefore the offers of proof made by the State of Texas in this matter and directed to the proposed testimony of Bob R. Harris and Barry Hunsaker, together with designated exhibits, should be admitted as and given the dignity of evidence herein (as should the offers of proof directed to the proposed testimony of Arlen Edgar and F. X. Jordan, together with designated exhibits); the subpoena duces tecum directed to Barry

Hunsaker should be permitted to issue, as consistently urged by the State of Texas; and that this matter should in all things be remanded to the Commission with proper instructions to assure full development of a complete record covering all relevant and material matters prior to a final decision's being reached herein and before the issuance of an opinion and accompanying orders.

The State of Texas respectfully submits that a dependable, alternate method of supplying gas to Northern California at a firm price and a price cheaper than the price of gas to be imported to California under the pending application exists. The Canadian gas, upon which PGT would depend, would be uncertain both as to supply and price, as reflected by the evidence in this hearing. Moreover, if the order granting the subject application is permitted to stand, the importation of the great volume of Canadian gas thereunder would cause irreparable injury to the domestic natural gas industry and result in a drastic curtailment of exploratory efforts therein. Such devastation of a vigorous and important segment of the national economy through artificial and arbitrary action must not be permitted.

The uncertainty of price and of supply of PGT's Canadian gas and the patently adverse effect, which the importation of such gas would have upon the domestic economy, may be clearly contrasted with the dependable and lower priced Texas gas available to the Northern California market, the sale of which would most certainly have a broad and stimulating effect upon the economy of the United States.

The State of Texas, as a party to this hearing, does

not seek false or fabricated advantages over any other party hereto, but rather seeks, by undertaking to present all relevant facts, to continue to oppose the application to import Canadian gas, which has been approved by the Commission, the importation of which, the State of Texas submits and believes, will provide, according to the record herein, a foreign gas supply, the sufficiency of which has not been adequately developed in this hearing, to Northern California, subject to necessary curtailment or withdrawal by the Canadian government at any time and further subject to expected and unexpected periodic price increases, and moreover will provide a foreign gas supply less stable and less desirable than the presently available alternate supply of gas from Texas.

The State of Texas finally submits that an alternate source of natural gas is presently available from Texas to supply the Northern California market through more efficient utilization of existing facilities, which gas is more dependable and lower in price at the California border than the foreign gas proposed by PGT and permitted to be imported by the Commission's subject order, and that when the availability of such gas produced in Texas is fully considered, which the State of Texas has urged as a relevant, material and proper consideration herein, the proposal of PGT will be found inconsistent with and detrimental to the public interest and that therefore its application will be in all things denied.

WHEREFORE, for all of the foregoing reasons, the State of Texas respectfully submits that this Honorable Court should set aside and hold for naught Commission Opinion No. 495 and accompanying orders

and remand this matter to the Commission with appropriate instructions requiring admission of the aforementioned evidence proposed by the State of Texas and excluded by the Commission into the record for consideration and requiring the issuance of a subpoena duce tecum directed to Barry Hunsaker, as urged by the State of Texas, and/or in all things deny the application of PGT herein as being inconsistent with and detrimental to the public interest.

Respectfully submitted,

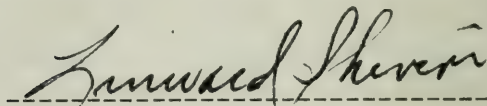
THE STATE OF TEXAS

WAGGONER CARR
Attorney General of Texas

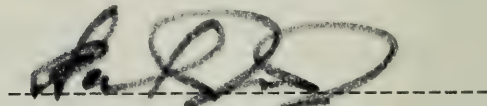
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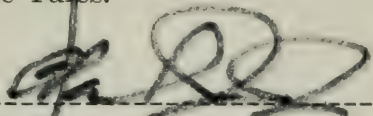


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Certification

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



C. DANIEL JONES, JR.

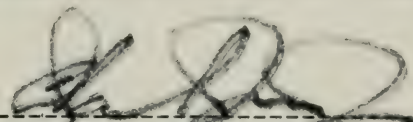
Certificate of Service

I hereby certify that I have this day served the foregoing upon the following party:

Howard E. Wahrenbrock,
Solicitor
441 G Street, N.W.
Washington, D. C. 20426

and all parties to this proceeding.

Dated at Austin, Texas this the 9th day of December, 1966.



C. DANIEL JONES, JR.

APPENDIX

APPENDIX INDEX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 21313

STATE OF TEXAS

v.

FEDERAL POWER COMMISSION

APPENDIX OF THE STATE OF TEXAS

**OPINION AND ORDER ISSUING CERTIFICATE
AND AUTHORIZING IMPORTATION OF
NATURAL GAS**

Issued: June 15, 1966

**UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION**

	Docket Nos.
	CP65-213
Pacific Gas Transmission Company	CP65-214
	CP65-215

OPINION NO. 495

APPEARANCES

Raymond N. Shibley, Richard H. Peterson, Malcolm H. Furbush, and John A. Sproul for Pacific Gas Transmission Company

Linward Shivers, Wagner Carr, C. L. Snow, Jr., and C. Daniel Jones, Jr. for the State of Texas

Richard E. Tuttle, J. Calvin Simpson and Sheldon Rosenthal for the People of the State of California and Public Utilities Commission of the State of California

Robert E. Simpson for Washington Utilities and Transportation Commission, Idaho Public Utilities Commission and Public Utility Commission of Oregon

Allan G. Shepard and Larry D. Ripley for Idaho Public Utilities Commission

Henry F. Lippitt, II, for Oil Producers Agency of California, California Gas Producers Association, and Jade Oil & Gas Company

Edward G. Najaiko, C. Grank Reifsnyder and Jeremiah C. Collins for El Paso Natural Gas Company

William I. Powell for Independent Petroleum Association of America

Roger J. Nichols and Eric W. Martens for Southern California Gas Company, Southern Counties Gas Company of California, and Pacific Lighting Gas Supply Company

George J. Meiburger for Washington Natural Gas Company

Robert Laughead for the City and County of San Francisco

John Davenport for Texas Independent Producers & Royalty Owners Association, West Central Texas Oil and Gas Association and Permian Basin Petroleum Association

Robert L. Russell and John J. Keating Jr. for the Staff of the Federal Power Commission

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, David S. Black, and Carl E. Bagge.

Docket Nos.

Pacific Gas Transmission)	CP65-213, CP65-214,
Company)	CP65-215

OPINION NO. 495

OPINION AND ORDER ISSUING CERTIFICATE AND AUTHORIZING IMPORTATION OF NATURAL GAS

(Issued June 15, 1966)

ROSS, Commissioner:

On August 5, 1960, a certificate was issued to Pacific Gas Transmission Company (PGT) authorizing the construction and operation of a 614-mile section of 36-inch pipeline extending from the international boundary at Kingsgate, British Columbia to the Oregon-California boundary.¹ This section of pipeline was one portion of approximately 1400 miles of 36-inch pipeline connecting gas-producing fields in the province of Alberta to the facilities of Pacific Gas & Electric Company (PG&E) in northern California. PGT was originally authorized to deliver an average of 415,000 Mcf of gas per day to PG&E.

In the present proceeding PGT has applied (Docket No. CP65-213) for a certificate of public convenience and necessity pursuant to Section 7(c) of the Natural Gas Act authorizing the transportation and sale through the same pipeline of an additional 200,000 Mcf of gas per day, delivery of the first additional 100,000 Mcf per day to begin on November 1, 1966 and delivery of the second additional 100,000 to begin on November 1, 1967; the certificate would also authorize construction and operation of certain additional facilities necessary to transmit the additional volumes of gas. PGT is also applying (Docket No. CP65-214) under Executive Order No. 10485, dated September 3, 1963, for

¹Pacific Gas Transmission Company, Docket No. G-17350, 24 FPC 134.

a Presidential Permit authorizing the construction, operation and maintenance of the pipeline required at the international boundary to permit the importation of the increased quantities of gas. PGT's third application herein (Docket No. CP65-215) is made under Section 3 of the Natural Gas Act for authorization to import natural gas from Canada.

Notices of intervention were filed by the State of Texas, the People of California and the California Public Utilities Commission (California PUC), the Washington Utilities and Transportation Commission, the Idaho Public Utilities Commission, the Public Utility Commissioner of Oregon, and the City and County of San Francisco (San Francisco). By order of May 25, 1965, the Commission granted intervention to El Paso Natural Gas Company (El Paso), Texas Independent Producers and Royalty Owners Association, Permian Basin Petroleum Association, West Central Texas Oil and Gas Association (the last three, filing a joint brief on exceptions, will be referred to as TIPRO, *et al.*), California Gas Producers Association, Jade Oil and Gas Company, and Oil Producers Agency of California (the last three, filing a joint brief on exceptions, will be referred to as California Producers), Independent Petroleum Association of America (IPAA), Southern California Gas Company, Southern Counties Gas Company of California, Pacific Lighting Service and Supply Company (the last three, filing a joint brief on exceptions, will be referred to as California Distributors), and The Washington Natural Gas Company.

After a hearing, the presiding examiner's initial decision was issued February 17, 1966. The examiner

would issue PGT a certificate authorizing transportation and sale of the additional quantities of gas to PG&E and authorizing the importation of the gas from Canada. The initial decision states (pp. 25-26) that, since the original Presidential Permit issued August 5, 1960² granted permission to operate and maintain the facilities necessary to transport the gas across the international boundary, no amendment or additional Presidential Permit need be issued here.

Exceptions to the initial decision have been filed by the State of Texas, TIPRO, *et al.*, IPAA, and California Producers, all of whom oppose the issuance of the certificates sought by Pacific Gas Transmission Company. San Francisco and California PUC would approve issuance of the certificates but have excepted to the examiner's refusal to fix a lower rate of return ($6\frac{1}{8}$ percent) to PGT than the $6\frac{1}{4}$ percent allowed. They also except to the examiner's refusal to make a different computation of depreciation as affected by the net salvage which may be realized on the facilities. The Commission staff, while supporting the issuance of the certificates sought by PGT, has excepted to the refusal of the examiner to attach a condition requiring the renegotiation of certain prices to be collected for gas by Canadian producers in order to protect the American consumers from price escalation and to the further refusal of the examiner to require that "any future supplies of natural gas for the Pacific Gas & Electric Company market should come from domestic sources so that there may be some balance between the sources of supply" (Staff Brief on Exceptions, p. 9).

²Pacific Gas Transmission Company, Docket No. G-17352, 24 FPC 134, 143, Ordering Paragraph (D).

The regulatory bodies of Oregon, Washington and Idaho filed briefs opposing exceptions, as did California Distributors.

Oral argument has been requested by the State of Texas, TIPRO, *et al.*, IPAA and the California Producers.

We think that the exceptions to the examiner's initial decision must be denied and that the certificates applied for should be issued to the applicant. We are concerned here with already existing pipeline facilities which are not yet being utilized to their fullest capacity. The increased use of the existing pipeline facilities will reduce the unit cost of the gas supplied to California and will also reduce the unit cost of transportation of gas transported for El Paso and destined for the consumers in Washington, Oregon and Idaho. To refuse to issue certificates authorizing the importation, transportation, and sale of this additional gas would mean that some of the capacity of presently existing facilities would remain unused with resultant higher costs to the consumers in four states.

The arguments that have been made as to the inadequacy of the Canadian gas supplies, while they would be relevant to a determination of whether a new pipeline should be built, are not appropriate where existing pipeline facilities will be utilized to make delivery of the gas. Even if the Canadian supplies were shown to be too small to justify the construction of a new pipeline, it would seem desirable to allow already existing facilities to be used to bring out whatever gas may be available. In addition we think that there has been no showing that the Canadian supplies are inadequate. We considered this question before authorizing the

construction of these pipeline facilities. We then determined that the sources of supply were sufficient to justify construction of facilities which, with relatively little additional construction, would have capacity to carry all present and proposed gas imports. Nothing has been presented here which would persuade us that our prior determination was erroneous.

Those opposing these applications state that a similar amount of gas could be made available by domestic producers and urge that as a matter of policy the importation of gas should be restricted. It is urged that the importation of natural gas has a depressing effect on the domestic industry, especially domestic exploration, and that domestic supplies should be utilized wherever possible in order to encourage domestic exploration and development as well as to benefit the American industry.

Unlike the *Rock Springs* proceeding,³ the record in this case does not demonstrate that alternative methods exist for providing the needed volumes of additional gas at rates and under conditions more advantageous than those which will be achieved by certification of PGT's instant application.

The Commission will consider carefully in every case the effect of importations of natural gas upon the domestic industry and upon the exploration and development which may be needed to develop future gas supplies. In the circumstances of the present case, where the need of the market for additional gas is established, where the basic facilities to procure the Canadian gas have already been constructed, where no competing

³*El Paso Natural Gas Co.*, 30 FPC 77 (July 12, 1963).

application for transportation and sale from an alternative domestic source has been filed by any pipeline, and where there will be a reduction in unit cost of service which will benefit the consumers of four states, we think the benefits to be derived from granting these applications far exceed any alleged detriments to the domestic petroleum industry or its exploration and development program. There appears to be little doubt that California will absorb all the gas which producers in California can make available to pipelines there. While ample supplies of gas are available in Permian Basin and other areas in the southwest, the facilities for bringing this gas to California in the amounts desired by consumers are not now available, nor can they be available for some time.

The suggestion is made that the Canadian supplies may be cut off and are therefore unreliable. We think that the close relationship between the United States and Canada renders it unlikely that this sort of difficulty will arise. Also, this is an argument more properly advanced at the time of an application to construct new pipeline facilities. That a supply may be cut off in the future is not an argument against using existing facilities to bring out gas up to the time any cut-off occurs, although it may be an argument against investing in new facilities.

We have previously considered the contention here advanced that the Mandatory Oil Import Program would require the denial of authorization to import natural gas for domestic use. *The Montana Power Company*, Opinion No. 486, pages 5-6. We conclude that the Mandatory Oil Import Program does not apply to the importation of natural gas. In any event, in the

circumstances of this case, the factors, even if otherwise applicable, which gave rise to the Program, do not operate to prevent the authorizations sought by PGT.

Staff has suggested that the certificates be conditioned to require that Canadian producers supplying the gas to Canadian pipelines for transportation on a cost-of-service basis to PGT should submit to renegotiation of their contracts to eliminate price escalation provisions (based on weighted average field prices) for protection against possible price increases which would increase the cost of gas to PGT and, ultimately, the American consumer. Such a condition was not imposed when the present pipeline facilities were authorized, although 98 percent of the Canadian producers' contracts then contained such escalation provisions. See *Pacific Gas Transmission Company*, 24 FPC 134, 137. Later contracts do not contain these escalation provisions. About 54 percent of the reserves supporting the present proposed expansion were acquired under contracts without such escalation provisions. (The remaining 46 percent were acquired by extensions of existing contracts to cover reserves added by additional development in already dedicated fields.) New reserves are acquired under contracts which do not contain such escalation clauses.

There has been a decline in the percentage of reserves covered by the escalation clauses in question, and it appears this decline will continue. A majority of the additional gas that is the subject of the present applications will be furnished under contracts which do not contain these escalation clauses, and this will have a retarding effect upon any potential price esca-

lations. To require renegotiation of the producers' contracts, which we cannot directly control, might result in delay in obtaining the desired supplies of gas. There will be an immediate saving to American consumers when this gas is made available, and the potential price increase is some time in the future, if it occurs at all. We agree that it would be preferable if this type of escalation clause were not included in producer contracts, and its presence in contracts for new supplies would clearly be a factor in our consideration of any application for certification of pipeline facilities. In the circumstances here stated, however, we think the examiner was correct in his conclusion that the suggested condition not be included.

Staff has also suggested that it be here determined that future supplies of gas be drawn from domestic sources. We cannot bind future Commissions in their determinations as to what may best serve the public convenience and necessity in this regard, nor would it be wise to do so if we could. This is a question which should be passed upon in the light of the circumstances which may be presented at the time of a particular application to make use of particular reserves. Accordingly, it will not be predetermined here.

California PUC and San Francisco urge that the rate of return established in the 1960 certificate proceeding should be reduced from $61\frac{1}{4}$ percent to $61\frac{1}{8}$ percent. The examiner and the Commission Staff are of the view that any revision of the rate of return should be dealt with in a rate proceeding. While there are occasions where rates may be dealt with in a certificate proceeding, in general it is preferable that the prompt issuance of a certificate not be delayed by hear-

ing and consideration of rate revision issues. We think that there has been no such showing as would lead us to adjust the established rate of return in this proceeding. This ruling is without prejudice to any determination we may be called upon to make in a later proceeding.

For the same reasons, we approve the examiner's refusal to revise the annual depreciation rate and to reduce the dollar value of the plant to which depreciation is applied by 10 percent, the alleged net salvage on PGT's line.

We think that oral argument is not necessary in this case. In so ruling, we recognize the general question of policy as to whether restrictions should be placed upon the importation of natural gas, and, if so, what these restrictions should be, are matters of the greatest importance. This case does not, however, provide a suitable context in which to debate such general policies. General policy arguments would be more properly presented where the construction of new facilities is proposed to tap foreign gas supplies, rather than where the applicant seeks only to make use of existing facilities already authorized. The other questions which have been raised appear to have been fully presented by the briefs of the participants, and little benefit would be derived from oral argument as to them. The motions for oral argument will be denied.

The Commission finds:

(1) The applicant, the Pacific Gas Transmission Company, is engaged in the transportation and sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction

of the Commission, and is therefore a “natural gas company” within the meaning of the Natural Gas Act. See *Pacific Gas Transmission Company*, 24 FPC 134, Finding (5) p. 140.

(2) The additional facilities proposed by Pacific Gas Transmission Company hereinabove referred to and more fully described in the Pacific Gas Transmission Company applications and the evidence herein, will be used in the transportation and sale of the additional quantities of natural gas in interstate commerce, subject to the jurisdiction of the Commission, and such additional facilities, together with the construction and operation thereof, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) Pacific Gas Transmission Company has an adequate supply of natural gas committed to it which will enable it to render the service herein authorized.

(4) The additional facilities proposed by Pacific Gas Transmission Company are adequate to render the supplemental service herein proposed.

(5) Pacific Gas Transmission Company is financially able to construct and operate the proposed additional facilities estimated to cost \$13,857,000.

(6) A market exists for the proposed additional sales of natural gas by Pacific Gas Transmission Company to Pacific Gas and Electric Company.

(7) The Pacific Gas Transmission Company plan for rendering the additional service to Pacific Gas and Electric Company is feasible.

(8) Pacific Gas Transmission Company is able and

willing, subject to the terms of this Order, properly to do the acts and perform the services proposed and to conform to the provisions of the Natural Gas Act, and the requirements, rules and regulations of the Commission promulgated thereunder.

(9) The construction and operation of the facilities proposed by Pacific Gas Transmission Company and its sales and transportation of the additional quantities of natural gas, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are required by the present and future public convenience and necessity, and a certificate of public convenience and necessity should be issued therefor.

(10) The proposed importation of the additional quantities of natural gas proposed by Pacific Gas Transmission Company is subject to the jurisdiction of the Commission under the provisions of Section 3 of the Natural Gas Act.

(11) The importation of the additional quantities of natural gas proposed by Pacific Gas Transmission Company in its application is appropriate and consistent with the public interest and should be authorized upon the terms and conditions of this Order.

(12) The terms of the existing Presidential Permit issued to Pacific Gas Transmission Company on August 5, 1960, 24 FPC 134, sufficiently provide for the proposed additional imports and no amendment or additional Presidential Permit is required.

The Commission orders:

(A) A certificate of public convenience and neces-

sity is hereby issued to the Pacific Gas Transmission Company authorizing it to import from Canada an additional 100,000 Mcf per day of natural gas commencing on or about November 1, 1966, and an additional 100,000 Mcf per day of natural gas commencing on or about November 1, 1967 for transportation and sale to the Pacific Gas and Electric Company for resale, all as more fully described in the applications filed herein and the evidence received in these proceedings.

(B) The authorizations granted to Pacific Gas Transmission Company under paragraph (A) hereof are subject to the terms and conditions imposed upon the authorizations granted to Pacific Gas Transmission Company *et al.*, by the Order of the Commission issued August 5, 1960, 24 FPC 134, insofar as said terms and conditions are applicable, and the said terms and conditions shall apply with respect to the additional gas imported, transported and sold under the authorizations here granted.

By the Commission.

(S E A L)

Joseph H. Gutride,
Secretary.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

	Docket Nos.
Pacific Gas Transmission Company	CP65-213
	CP65-214
	CP65-215

**PRESIDING EXAMINER'S INITIAL DECISION
UPON AN APPLICATION FOR A PRESIDENTIAL
PERMIT AND UPON APPLICATIONS UNDER
SECTIONS 3 AND 7 OF THE NATURAL GAS ACT**

(Issued February 17, 1966)

APPEARANCES

Raymond N. Shibley, Richard H. Peterson, Malcolm H. Furbush, and John A. Sproul for Pacific Gas Transmission Company

Linward Shivers, Wagner Carr, C. L. Snow, Jr. and C. Daniel Jones, Jr. for the State of Texas

Richard E. Tuttle, J. Calvin Simpson and Sheldon Rosenthal for the People of the State of California and Public Utilities Commission of the State of California

Robert E. Simpson for Washington Utilities and Transportation Commission, Idaho Public Utilities Commission and Public Utility Commission of Oregon

Allan G. Shepard and Larry D. Ripley for Idaho Public Utilities Commission

Henry F. Lippitt, II, for Oil Producers Agency of California, California Gas Producers Association, and Jade Oil & Gas Company

Edward G. Najaiko, C. Frank Reifsnyder and Jeremiah C. Collins for El Paso Natural Gas Company

William I. Powell for Independent Petroleum Association of America

Roger J. Nichols and Eric W. Martens for Southern California Gas Company, Southern Counties Gas Company of California, and Pacific Lighting Gas Supply Company

George J. Meiburger for Washington Natural Gas Company

Robert Laughead for the City and County of San Francisco

John Davenport for Texas Independent Producers & Royalty Owners Association, West Central Texas Oil and Gas Association and Permian Basin Petroleum Association

Robert L. Russell and John J. Keating, Jr. for the Staff of the Federal Power Commission

FRAZEE, PRESIDING EXAMINER: This proceeding concerns applications filed on January 12, 1965, and amended on March 31, 1965, by the Pacific Gas Transmission Company (PGT) seeking the requisite certificates, import and Presidential Permits, which would authorize it to install, construct and operate the additional facilities¹ necessary to import an additional

¹On August 5, 1960, the Commission in *Pacific Gas Transmission Company*, 24 FPC 134, authorized PGT to construct and operate a 614-mile section, of a 1400-mile line, of 36-inch pipe extending from the Canadian-U.S. border (near Kingsgate, British Columbia) to the Oregon-California border to deliver to PG&E a daily contract quantity of 415,000 Mcf and a maximum daily demand of 454,000 Mcf of natural gas

200,000 Mcf² of natural gas per day from reserves dedicated by producers in the Province of Alberta, Canada. PGT also seeks the authority to sell and deliver these additional imported volumes of natural gas to the Pacific Gas and Electric Company (PG&E) at the Oregon-California border, from which point the gas will be transported, distributed and sold by PG&E to its customers in central and northern California.

On May 25, 1965, the Commission issued an order herein granting interventions,³ fixing dates for the fil-

to be imported from the Province of Alberta, Canada, and delivered to PG&E for resale and distribution in its California market area. The cost of this line and its appurtenant facilities amounted to \$116,940,000 (Ex. 45). The various regulatory agencies recognized, when they authorized the construction and operation of this 36-inch line, that it was oversized for the throughput of the initially certificated volumes of 415,000 Mcf per day. However, PGT there indicated that future authorizations would be sought to import additional volumes of natural gas to utilize the full capacity of the line.

²The 200,000 Mcf per day would be delivered to PG&E in two steps; the delivery of the first 100,000 Mcf/d would start on November 1, 1966 and the second 100,000 Mcf/d on November 1, 1967.

³Notices of intervention were filed by:

1. The State of Texas
2. The People of the State of California and the Public Utilities Commission of the State of California
3. The Washington Utilities and Transportation Commission
4. The Idaho Public Utilities Commission
5. The Public Utility Commission of Oregon
6. The City and County of San Francisco

Petitions to intervene were filed by:

1. El Paso Natural Gas Company
2. Texas Independent Producers and Royalty Owners Association
3. Permian Basin Petroleum Association
4. West Central Texas Oil and Gas Association
4. West Central Texas Oil and Gas Association
5. California Gas Producers Association

ing of prepared testimony and supporting exhibits⁴ and for a prehearing conference.⁵

At the prehearing conference held on July 22, 1965, dates were fixed for the filing of written motions, and replies thereto, directed to the admissibility of the filed prepared written testimony and supporting exhibits. The formal hearing was scheduled to convene on September 15, 1965.⁶

Numerous motions and replies thereto were filed, which were directed to the admissibility of all or portions of the prepared testimony and supporting exhibits filed by the State of Texas, the Permian Basin Petroleum Association, the People of the State of California and the Public Utilities Commission of the State of California; also to certain testimony offered jointly by the Oil Producers Agency of California, the California Gas Producers Association and the Jade Oil and Gas Company. These motions to exclude the proffered prepared direct testimony and supporting exhibits from the record herein were sustained.⁷ However, each of the parties was permitted to make an

6. Jade Oil and Gas Company

7. Independent Petroleum Association of America

8. Oil Producers Agency of California

9. The Pacific Lighting Companies

10. The Washington Natural Gas Company

⁴Applicant, PGT, to serve its prepared testimony and supporting exhibits on all parties on or before June 21, 1965. The Intervenor, and the Staff of the Commission, to serve any answering testimony and supporting exhibits on all parties on or before July 15, 1965.

⁵On July 22, 1965.

⁶Tr. 1, p. 128, ln. 21.

⁷Tr. 2, pp. 135-144.

offer of proof⁸ as provided by Section 1.28(b) of the Rules of Practice and Procedure of the Commission.

A hearing was held at which an opportunity was afforded all parties desiring to do so to offer relevant and material evidence, and a substantial volume of such evidence was offered and received. Further, those desiring to do so were permitted to file briefs.

This transportation of natural gas from the producing fields of Alberta, Canada, to the consumers of PG&E in California, is an international project. The basic original construction, as previously mentioned, partly resulted from United States authorizations obtained by PGT in 1960.⁹ The combined project operates through the joint effort of the following five internationally participating companies. These participants and their respective functions are described as follows:

1. The Alberta and Southern Gas Co. Ltd. (Alberta and Southern), incorporated under the Companies Act of Alberta, is a wholly owned subsidiary of PG&E. Its function is to purchase pipeline quality natural gas

⁸Tr. 8, pp. B and 993-995, the excluded testimony of the People of the State of California and the Public Utilities Commission of the State of California was marked as Exhibits 36 and 37 and rejected, but accepted as an offer of proof.

Tr. 11, pp. A and 1533-1534, the excluded testimony jointly sponsored by the Oil Producers Agency of California, the California Gas Producers Association and the Jade Oil and Gas Company was marked as Exhibit 52 and rejected but accepted as an offer of proof; also at Tr. 12, pp. A and 1739, 1760 a letter with attachments was marked at Exhibit 64 and rejected, but accepted as an offer of proof.

⁹For a discussion of the "Identity and Short Designation of Participants and Other Interests" see *Pacific Gas Transmission Company*, 24 FPC 144, 145 (the Examiner's decision) and the "Producers, Pipelines, and Public Authorities in Canada" at 24 FPC 134, 136 (the Commission Order).

from producers in the Province of Alberta and arrange for its transportation in Alberta and through British Columbia to the International Boundary where the gas is sold and delivered to PGT.

The National Energy Board of Canada authorized Alberta and Southern, in the original phase of this international project, to export 458,750 Mcf of natural gas per day.

Alberta and Southern owns no transmission facilities. Its plant consists of physical property and equipment valued at \$2,738,000 in 1964, which would not be increased as a result of the proposed increase in imports.

2. The Alberta Gas Trunk Line Company Limited (Trunk Line) was incorporated by a Special Act of the Alberta Legislature. Its function is the gathering and transporting, within the Province of Alberta, of the natural gas purchased at the tailgate of processing plants by Alberta and Southern. Trunk Line has constructed, and it operates, the facilities necessary to gather and transport¹⁰ the natural gas authorized to be exported from the Province of Alberta and the Dominion of Canada and imported into the United States in *Pacific Gas Transmission Company*, 24 FPC 134. It will construct and operate the facilities required to transport the additional 200,000 Mcf per day purchased by Alberta and Southern for export to the United States, which is the subject of these proceedings. Trunk Line has no corporate connection with any other com-

¹⁰Trunk Line's facilities consist of approximately 222 miles of receiving and delivery laterals and about 350 miles of main line extending from Alberta to the British Columbia border. Its investment in these in place facilities presently amounts to \$82,638,000 (Ex. 45).

pany participating in this project, except that Alberta and Southern holds one share of Class B Group II common shares of Trunk Line.

3. The Alberta Natural Gas Company (Alberta Natural) was incorporated and authorized by a special act of the Parliament of Canada to transport natural gas in interprovincial and foreign commerce. It currently transports natural gas owned by Alberta and Southern and by Westcoast Transmission Company Limited (Westcoast) from a point in Alberta near the Alberta-British Columbia boundary through British Columbia to the International Boundary near Kingsgate, British Columbia. It will construct and operate the additional compressor facilities¹¹ necessary to transport the additional 200,000 Mcf per day which is the subject of this hearing. Two-thirds of the common stock of Alberta Natural is owned by PGT and the remaining one-third is owned by the public.

4. PGT, the applicant herein, was incorporated in August 1957, in the State of California (Exhibit 2) and has since been authorized to do business in the States of Oregon, Idaho and Washington. It is a "natural gas company" within the meaning of that term under the Natural Gas Act. See *PGT*, 24 FPC 134, Findings (5), p. 140. It owns and operates the 614-mile section of the project pipeline from the International Boundary near Kingsgate, British Columbia, to the California-Oregon border which was authorized by this Commission in *PGT*, 24 FPC 134. PGT's actual in-

¹¹Alberta Natural consists of 106 miles of pipeline in which it presently has an investment of some \$32,637,000. Additional expenditures will be necessary for the facilities here requested.

vestment costs for the construction of this line and its appurtenant facilities amounted to \$116,940,000. PGT here seeks authorization to install, construct and operate the following additional facilities which, it alleges, will be required to transport the additional 200,000 Mcf per day:

- (1) 8,250 additional horsepower of compression at its compressor station No. 4 near Sandpoint, Idaho
- (2) A new 10,000 horsepower compressor station No. 6 near Rosalia, Washington
- (3) A new 10,000 horsepower compressor station No. 9 near Ione, Oregon
- (4) A new 16,000 horsepower compressor station No. 11 near Madras, Oregon
- (5) A new 16,000 horsepower compressor station No. 14 near Bonanza, Oregon
- (6) Additional metering facilities at the existing metering station at the Oregon-California border
- (7) A maintenance base near Candon, Oregon
- (8) A gas control computer in its office building in Spokane, Washington, and
- (9) It will also change its impellers at its station Nos. 8 and 13, near Wallula, Washington and Diamond Junction, Oregon, respectively.

The estimated cost of the foregoing proposed construction is \$13,857,000.

PGT purchases its gas from Alberta and Southern at the International Boundary pursuant to a contract dated January 31, 1961, as amended, and sells gas at the California-Oregon border to PG&E pursuant to a

tariff on file with the Federal Power Commission. PGT also presently transports about 150,000 Mcf per day of an authorized maximum of 300,000 Mcf per day of natural gas, under contract as a common carrier, for the El Paso Natural Gas Company (El Paso) to points on the PGT line in the States of Washington, Idaho and Oregon as specified by El Paso and authorized by this Commission in *PGT*, 24 FPC 134. This gas is purchased by El Paso from Westcoast at the International Boundary.

The final portion of this international pipeline is owned and operated by PG&E and consists of 298 miles of mainline beginning at a point of connection with PGT on the Oregon-California boundary and extending to Antioch, California. This section of the line originally cost \$54,250,000. It is entirely within the State of California.

CANADIAN GAS SUPPLY

The applicant, PGT, obtains its entire gas supply from Alberta and Southern under an existing cost-of-service contract (Exhibit 4). No changes, except to increase the volumes, will be made in this contract as a result of the increase in imports herein proposed. The applicant, PGT, presented a gas supply witness who testified concerning the adequacy of the gas reserves dedicated to Alberta and Southern and the deliverability of these reserves. This witness estimated the total recoverable gas reserves of pipeline quality gas available to Alberta and Southern on November 1, 1964 to be 5,509,340 million cubic feet at 14.73 psia at 60 degrees Fahrenheit (Exhibit 1, page 1). His testimony classified these reserves as follows:

Under contract	4,574,411 million cubic feet
Under option	553,513 million cubic feet
<hr/>	
Sub-total	5,127,924 million cubic feet
Other Available	381,416 million cubic feet
<hr/>	
Total	5,509,340 million cubic feet

The reserves "under contract" were attributed to acreage covered by contracts between producers in the Province of Alberta, Canada, and Alberta and Southern. "Under option" referred to those reserves underlying acreage committed to Alberta and Southern by options permitting it to purchase gas on specified definite conditions. It was stated that several of the fields have proved uncommitted reserves lying outside of the contract or option acreage. These reserves the witness classified as the "other available." The witness stated that, in his classification of reserves, he had not included in the "other available" category any reserves for those field from which a competing pipeline is purchasing gas. From the testimony of this witness it was shown that the reserves presently available to Alberta and Southern are estimated to be sufficient to meet its estimated delivery requirements¹² for 17 years from

¹²The total delivery requirements of Alberta and Southern to PGT and to Montana Power Co. (24 FPC 134) were shown in Exhibit 1, and at Tr. 166, also at page 9 of the Staff Brief, to be:

	Annual	Daily
1965	164,900	451.8
1966	164,900	451.8
1967	206,000	564.4
1968	248,900	681.9

The commitments of Alberta and Southern were shown (Exhibit 5; Tr. 336, Staff Brief p. 9) to be:

and after November 1, 1964, and to have a life index of 23.1 years (Exhibit 1, page 5). It was further indicated that, considering only the proved contracted reserves which have a life index of 19.2 years, Alberta and Southern would have sufficient gas to meet its estimated delivery requirements for 13 years from and after November 1, 1964¹³ (Exhibit 1, page 4). The adequacy of the gas supply to support the additional deliveries to PGT was not questioned. This reserve witness did not utilize a specific cutoff pressure although he estimated that generally the wells would produce up to 25 percent of their open flow. Eventually the shut-in well pressure will be less than the pipeline pressure. At this point compression will become necessary, which will increase the cost-of-service to the applicant and to the ultimate consumer.

The Montana Power Company

	Maximum Daily Demand (Mcf)	Daily Contract Quantity (Mcf)
1965	32,600	30,000
1966	44,000	40,000
1967	44,000	40,000
1968	55,000	50,000

Pacific Gas Transmission

	Maximum Daily Demand (Mcf)	Quantity (Mcf) Daily Contract
1965	454,000	415,000
1966	552,000	515,000
1967	665,000	615,000
1968	665,000	615,000

¹³The Staff, at page 10 in its brief, states "Alberta and Southern can meet its total proposed requirements for a period in excess of 13 years as of January 1, 1965. Predicated upon its reserves actually under contract Alberta and Southern has shown a deliverability life of approximately 13 years (Ex. 1, p. 4)."

CANADIAN GAS SUPPLY CONTRACTS

PGT, in support of its application for a certificate of public convenience and necessity submitted copies of the various gas purchase agreements utilized by Alberta and Southern to purchase gas from Alberta producers (Exhibit 6). Initially, in acquiring the gas for the project certificated at 24 FPC 134, Alberta and Southern utilized three types of contracts¹⁴ and the gas acquired thereunder fell into the following categories:

Contract Forms	Percentage of Gas Supply
A	77%
B	21%
C	2%

Contract Forms A and B have the same schedule of prices. Contract Form C is used in the purchase of casinghead gas and the schedule of prices for such gas is lower (Exhibit 6, tr. 325). It was noted by the Commission in 24 FPC 134, 137 “. . . that Alberta and Southern has entered into option agreements with several major producers covering areas containing both established and prospective reserves of great size. These agreements commit the producers to sell large additional volumes of gas at the same price as those in the present contracts, *when and as needed for the contemplated future expansion of this project.*” (Emphasis supplied.) Approximately 80 percent of the additional volumes here sought to be imported will come

¹⁴Contract Forms A, B and C were discussed by Presiding Examiner Weston at 24 FPC 134, 160 and were approved by the Commission in its Order, *supra*. These gas purchase contracts are set forth in summary form, and in full, Exhibit 6 on this record.

from the same fields from which the presently certificated import volumes are drawn. The reserves in these fields have increased by reason of additional development in areas covered by the original contracts and in other nearby areas not covered by the original contracts. The reserve appreciation in the fields covered by the original contracts¹⁵ accounts for 46 percent of the reserves for the presently proposed expansion. The remaining 54 percent of the reserves are covered by a new form of contract—Form D—which provides for a set schedule of prices established for the entire term of the contract and not subject to renegotiation. The 54 percent of the reserves are located in fields from which Alberta and Southern does not presently purchase gas. The gas supplies for the initial, and this proposed supplemental, projects will, when certificated, fall into these new categories:

Contract Forms	Percentage of Gas Supply
A	71%
B	15%
C	1%
D	13%

The pricing provisions in contracts Form A and Form B each contain in addition to fixed price escalations, certain renegotiation provisions beginning with the pricing period commencing July 1, 1968 and at each five-year interval thereafter during the term of the contract. These renegotiation provisions were elimi-

¹⁵These reserves are acquired by operation of the terms of the original contract and the increase in daily contract quantity is simply recorded by an exchange of letters to that effect between the producer and Alberta and Southern, the buyer.

nated from contract Form D under which gas purchases are currently being made.

As to the probable effect of these renegotiations on prices after July 1, 1968, the Vice President and General Manager of Alberta and Southern testified that export buyers of gas in Alberta were presently contracting for gas at prices both higher and lower than those being paid by Alberta and Southern but, in his opinion, the higher prices paid by others for export gas would not necessitate an upward renegotiation in Alberta and Southern's price. He does expect a request from the producers for a negotiation and, if an agreement is not reached between the producers and Alberta and Southern as to price, the matter is then referred to arbitrators whose findings are final and binding on both the buyer and the seller.

The witness testified that the Province of Alberta has a statute which provides the authority for the regulation of prices paid producers for natural gas but that he knew of no regulations issued thereunder by Alberta regulatory authorities for the establishment of ceiling prices for the sale of natural gas for export.

A witness for the Texas Independent Producers and Royalty Owners Association (TIPRO), an intervenor, testified, in rebuttal, that he had personally negotiated and excluded contracts for the sale of natural gas produced by him in Texas and in Alberta. It was his opinion the Form A and Form B contracts used by Alberta and Southern are "open-ended"; that renegotiation will inevitably result in prices higher than those specified in the periodic escalation schedules but that there was no way at this time to determine what the price will be following renegotiation.

When it issued the original certificate on August 5, 1960, authorizing this project in 24 FPC 134 the Commission had this identical problem before it—98 percent of the gas there authorized to be imported was purchased under contracts Form A and B—and it said, at page 137:

“Beyond these limiting factors, there remains the primary responsibility of the Canadian authorities to regulate producer and pipeline rates in such a way as to insure that the mutual benefits of the project as a whole will continue. A careful review of the Canadian legislation, including the National Energy Board Act, the Alberta Pipe Line Act, and the Alberta Gas Utilities Act, and the determinations made thereunder with regard to this project, demonstrates that the Canadian regulatory authorities now have a comprehensive rate and certificate jurisdiction at least equal to our own, and broad enough, in letter and spirit, to give effect to the principles of international comity and mutual responsibility on which the continuing success of this project ultimately depends. This legislation embodies the same ‘just and reasonable’ standards as are found in the Natural Gas Act and guarantees that the American and Canadian consumer will be treated alike.”

Since the issuance of this order at 24 FPC 134, the Commission has determined that indefinite pricing escalation provisions of certain types in domestic producer contracts for the sale of natural gas in interstate commerce are contrary to the public interest. *Pure Oil Co.*, 25 FPC 383, *affirmed*, 299 F. 2d 370; See FPC Order No. 174-B, 13 FPC 1576; FPC Order No. 232, 25 FPC 379, as amended by Order No. 232A, 25 FPC 609; FPC Order No. 242, 27 FPC 339, and Sec-

tion 154.91, *et seq.*¹⁶ of the Commission's Regulations Under Natural Gas Act; also *FPC v. Texaco Inc.*, 377 U.S. 33; *Atlantic Refining Co.*, 32 FPC 17.

These Form A and Form B contracts contain another indefinite pricing provision which requires the purchaser, commencing with the year 1968, to give annual written notice to the seller showing the purchaser's weighted average cost per Mcf of gas purchased from the fields located in whole or in part in Alberta. Should the buyer's weighted average cost per Mcf be higher than the price being paid to the seller then, in the following year, the buyer must make an appropriate price adjustment to seller to bring his price up to purchaser's weighted average cost for the previous year.

In accordance with the foregoing "open-ended" pricing provisions in the Form A and Form B contracts it was said by the Alberta and Southern gas supply witnesses that 86 percent of the contracts which underlie the gas supply after this proposed expansion would be renegotiated in 1968. This witness was of the opinion, however, that, should a higher price for some producers become effective as the result of renegotiation the remaining producers would not subsequently invoke the weighted average price provision to obtain

¹⁶Particularly Section 154.93(c) which defines one part of the "permissible" provisions as being, "Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question. . . ."

an increase in price per Mcf. The witness would concede, however, should an increase in price result from renegotiation it could trigger the weighted average price provision which would result in a general price increase. Since Alberta and Southern sells this gas to PGT on a cost-of-service basis which is reflected in the monthly billing statements, the impact of any price increase would be immediate.

Alberta and Southern have, what they refer to as, a "postage stamp" practice in negotiating for natural-gas reserves in Alberta. Under this practice each producer throughout the Alberta and Southern purchase system is paid the same price for similar gas. Thus, when additional gas is discovered the producer knows what price Alberta and Southern will pay for it. This lends incentive to a search for and the production of natural gas.

The foregoing renegotiation provisions contained in the Form A and Form B contracts are, quite obviously, contrary to the indefinite pricing provisions of Section 154.93 of the Commission's Regulations Under Natural Gas Act. Since Federal Power Commission jurisdiction does not extend to the Alberta and Southern gas purchase contracts with producers in Alberta, Canada, and Staff at pp. 30, *et seq.*, in its brief, discuss three alternative proposals in an attempt to resolve, or minimize, the possibility of a price increase as a result of contract renegotiations. The Staff proposals are:

- (1) Grant the certificate to PGT
- (2) Deny the application
- (3) Condition the certificate to require Alberta and

Southern, in the forthcoming renegotiations, to negotiate for the conversion of the Form A and Form B contracts to the new Form D contract.

Alberta and Southern appears to be fully aware of the possibility of price increases upon renegotiation and have therefore developed a new Form D contract which contains none of the renegotiation nor weighted average price increase provisions. Approximately 54 percent of the reserves supporting the present proposed expansion were acquired under the Form D contract. Under this contract there is a fixed schedule of prices for the life of the contract. (Exhibit 6). The remaining 46 percent of the reserves for this project were acquired by extensions of the original Form A and Form B contracts for reserves added by additional development in the already dedicated fields.

Alberta and Southern now uses the Form D contract exclusively for the purchase of new reserves. This contract appears to comply with Section 154.93 of the Commission's Regulations Under the Natural Gas Act. The Commission, when it issued PGT its original certificate on August 5, 1960 (24 FPC 134), had these same Form A and Form B contracts under consideration and it there said on page 137:

"... The most important of these costs is the cost of purchased gas reflecting Canadian producer prices. In this connection it is worth noting that Alberta & Southern has entered into option agreements with several major producers covering areas containing both established and prospective reserves of great size. These agreements commit the producers to sell large additional volumes of gas at the same prices as those in the present contracts, when and as needed for the contemplated future

expansion of this project. These reserve acreage contracts should have an important stabilizing effect on field prices in the foreseeable future. . . .”

The “additional volumes” of gas referred to in the above quotation account for 46 per cent of the gas for this expansion project.

The Commission in 24FPC 134, 137, commented on the Alberta Gas Utilities Act, recognized it as being:

“... considerably broader and more detailed than the comparable provisions of the Natural Gas Act and its clarity and scope with reference to gas producers and processors should enable the Alberta Board of Public Utility Commissioners to avoid many of the difficulties we have experienced.”

The Commission said, *supra*, it placed the full faith and confidence in the Canadian authorities to determine and fix just and reasonable rates. The Alberta producers, by agreeing to sell additional supplies of gas for export to the U. S. under Alberta and Southern’s Form D contract, and Alberta and Southern, in developing and using this contract instead of the previously used Form A and Form B contracts, each demonstrate their desire “to give effect to the principles of international comity and mutual responsibility” to the end that the consumer of natural gas will be protected against “unjust and unreasonable” prices. A certificate of public convenience and necessity will therefore be issued to PGT unconditioned insofar as the gas supply contracts are concerned.

FIELD PRICE OF GAS IN ALBERTA, CANADA

Initially the base price for pipeline quality gas was

13.50 cents per Mcf.¹⁷ This initial base price has, under the fixed escalation provisions of the Form A and Form B contracts, increased to 17.0 cents per Mcf and it will increase a further 0.25 cents per Mcf on July 1, 1968 so that on that date the base price will be 17.25 cents per Mcf for pipeline quality gas of approximately 1080 Btu content. The new reserves acquired for this proposed expansion under the new Form D contract were obtained at an initial base price of 17.0 cents per Mcf. Therefore, when the gas commences to flow for this expansion of imports project, it will cost at the tailgate of the processing plant the same price per Mcf as is being paid currently for the initially certificated gas, namely, 17.0 cents per Mcf. The record here shows all of the gas purchased in Alberta by Alberta and Southern is of pipeline quality and delivered at the tailgate of the processing plants at a pressure base of 900 to 1000 psig. The revenues obtained from the sale of the by-products extracted from the raw gas stream entering the processing plants are retained by the producers since they own the gathering system and the processing plants.

OREGON-CALIFORNIA BORDER GAS PRICE

PGT's 36-inch pipeline was originally certificated with full knowledge it was oversized for the initial volumes to be transported, however, it was then understood the throughput capacity could be increased substantially at reasonable cost. In this proceeding the applicant seeks to take advantage of this additional throughput capacity. A PGT witness sponsored Ex-

¹⁷For a detailed discussion of the field prices of gas to Alberta and Southern see *PGT*, 24 FPC 134, 160-161, Presiding Examiner Weston's decision.

hibit 19 showing the cost of Canadian gas delivered to PG&E at the Oregon-California border delivery point. The following tabulation¹⁸ shows the average cost in cents per Mcf of gas delivered to PG&E by PGT under its cost of service tariff:

	Without the Proposed Expansion ¢ Per Mcf	Without the Proposed Expansion ¢ Per Mcf	Incremental Cost of the Additional Volumes ¢ Per Mcf
1967	34.15	31.04	
1968	34.58	30.73	22.60
1969	34.49	30.91	23.36
1970	34.26	30.83	23.60

The certification of the increased volumes will materially decrease the delivered unit price of gas beginning with the year 1968 at the Oregon-California border from 34.58 cents to 30.78 cents, a reduction of 3.85 cents per Mcf, as illustrated in the above tabulation.

Natural gas is also transported on a cost-of-service basis by PGT for El Paso and its Canadian supplier, Westcoast. The El Paso gas is distributed in the Pacific Northwest States. The 1968 estimated transportation charge for the El Paso gas, without these additional volumes is estimated to be 7.10 cents per Mcf. However, with the increased volumes here sought, the 1968 transportation charge to El Paso would decrease to 5.76 cents per Mcf, a reduction of 1.34 cents per Mcf.

The following tabulation shows a comparison of the transportation charges for the El Paso gas:

¹⁸From Exhibit 19, pp. 2 and 3, as modified at Tr. 1306, *et seq.* to give effect to the use of the double declining balance depreciation for tax purposes on the facilities proposed for installation in 1966 and 1967.

	Without the Proposed Expansion ¹⁹	With the Proposed Expansion ¹⁹	Estimated Reduction in Transportation Costs ²⁰
1966	6.17¢	6.08¢	\$ 46,000 ²¹
1967	6.91	5.80	564,000
1968	7.10	5.76	681,000
1969	7.05	5.80	639,000
1970	6.95	5.85	564,000

The reduction in transportation charges to El Paso, as shown above, would amount to \$2,494,000 during the period 1966-1970.

A petition to intervene was filed by El Paso on February 15, 1965; a supplemental petition to intervene was filed on May 7, 1965. In these El Paso alleged, *inter alia*, this Commission has authorized it to sell and deliver natural gas to PG&E at the Arizona-California border near Tapock, Arizona, a firm maximum contracted daily demand of 1,025,000 Mcf (at 14.9 psia) under its Rate Schedule G; also, that this Commission authorized PGT to transport for El Paso in the United States, up to 150,000 Mcf per day of Canadian gas which El Paso purchases from Westcoast. By agreement between PGT and El Paso these volumes may be increased. El Paso was permitted to intervene (by Order issued herein on May 25, 1965). At page 49, ln. 20, of the Transcript, counsel for El Paso stated:

Mr. Reifsnnyder:

“El Paso has no application in this case; El Paso has no unfilled capacity by which, we could make deliveries to Pacific Gas and Electric Company.

¹⁹Tr. 1341, ln. 3, *et seq.*

²⁰Tr. 1342, ln. 20, *et seq.*

²¹For two month's period November 1, 1966 to December 31, 1966.

Therefore, we are not a competing applicant in this case, it has not been El Paso who offered any testimony. We have not filed any prepared testimony. That is all I think I can contribute."

Presiding Examiner:

"But El Paso did file a petition to intervene."

Mr. Reifsnyder:

"That is correct."

Presiding Examiner:

"So El Paso is a party?"

Mr. Reifsnyder:

"That is right. We are a participant in the proceeding under the Commission's rule, and our petition to intervene clearly sets forth our interest in this proceeding."

Much ado was provoked in several briefs from a comparison, by a PGT witness on cross examination, of the prices for natural gas delivered at the California border for delivery to PG&E by El Paso and PGT. No indication can be drawn, from the foregoing colloquy between the Examiner and counsel for El Paso, that El Paso either can or has the desire to make a proposal to supply the increased requirements of PG&E. El Paso was consistent in reiterating this position throughout the course of the hearing. (Tr. p. 425 and p. 1377).

ECONOMIC FEASIBILITY

The economic structure of this entire international operation is geared to cost-of-service arrangements between the individual companies. These arrangements

are designed to cover operating costs of the several companies and to realize a reasonable return on the depreciated plant investment.²² There was no issue on this record in regard to the economic feasibility of the proposed project. As the Staff says in its brief, for an increase of approximately \$30,000,000, which is slightly more than 10 percent of the total initial capital investment for the over-all international project, 50 percent more gas will be delivered to PG&E. Thus the feasibility of the entire project, because of the increased additional volumes that can be delivered for the 10 percent increase in capital investment, will rebound to the benefit of the consumer in lower rates.

FINANCING

The estimated cost to PG&T for additional facilities is \$13,857,000. This investment will be financed from funds on hand on January 1, 1964, and from funds gathered from operations and from bank loans. It was estimated these bank loans would be repaid in the three years period 1968 through 1970. There was no issue concerning the ability of PGT to finance the proposed expansion or as to the effect this financing would have on the PGT over-all financial plan.

MARKETS AND SUPPLY

There is no question PG&E will require large volumes of gas in the immediate future to supply its rapidly expanding market demand. The source of this

²²The Canadian companies charge a 7.5 percent rate of return on their individual investments. See Exhibit 7, p. 34, Alberta Gas Trunk Line Company, Ltd., transportation agreement; also Exhibit 7, p. 24, the Alberta Natural Gas Company, transportation agreement.

additional supply of gas generated some problems to be considered.

The California Gas Producers Association, the Oil Producers Agency of California and the Jade Oil and Gas Company (hereinafter referred to as the California Companies), argue that PG&E, in its estimates of the future availability of California produced gas, fails or is unwilling to make, what the California Companies term "a realistic" estimate of the future availability of northern California gas. The California Companies claim their future exploration, together with the development of present fields, will be more than sufficient to supply the increased market demand of PG&E for at least one year, therefore the certification to import the additional quantities should be deferred for at least one year. The California Companies also complain about these terms of the contracts offered them by PG&E for the purchase of their gas production. They allege the contracts are not uniform since some require a 2 to 1 peak to minimum delivery while others require 3 to 1 and some require as much as 5 to 1. When the producer is unable to deliver these peak quantities then the contract demand is reduced to the quantity it is able to deliver. The PG&E rebuttal witness states the contractual provisions complained about predate the purchase of out-of-state gas and were not designed to make room for it. This witness further testifies it is the consistent policy of PG&E to make a market for California produced gas as it becomes available. The contracts contain take-or-pay provisions, therefore if California gas is available it will either be taken or paid for by PG&E. The witness stated there were but two problems in the utilization of Califor-

nia gas. First, the location or locations of the production, and second, the Btu content of the gas. The domestic gas produced by PG&E from El Paso has a Btu content of 1090 and the Canadian gas has a Btu content of 1080 while, the witness states, the California gas varies greatly in heating value, the 1964 weighted average being 986 Btu.²³ The gas delivered by PG&E in the San Francisco-East Bay area is carefully controlled to approximate a 1075 Btu content. This necessitates a blending of the out-of-state gas with the California gas.

The PG&E requirements, and the source thereof, are reflected in the following compilation:

Daily Average Gas Supply
(Exhibit 17, p. 9 of 9)
MMcf

	1965	1968	1970
California produced	608.2	453.5	328.2
El Paso	1,020.3	1,028.9	1,035.8
PGT	416.8	614.4	614.4
Storage	58.1	10.9	4.9
Total	<u>2,103.4</u>	<u>2,107.7</u>	<u>1,983.3</u>

PG&E's Forecast of Average Daily Requirements
(Exhibit 18, p. 7)
MMcf

1965	1968	1970
<u>2,162</u>	<u>2,467</u>	<u>2,632</u>

The foregoing tabulation of the PG&E daily average gas supply and its estimated requirements in 1970, assuming the certification of the volumes here requested, reflect a need for approximately 650,000 Mcf additional (2,632.0 — 1,983.3 = 648.7 Mcf).

²³The three fields from which PG&E purchased the bulk of its California gas, and the Btu content, are the Rio Vista at 1045 Btu, the Grimes area at 1003 Btu and the Lathrop at 871 Btu (Tr. 1619).

It is also shown from the PG&E daily average gas supply estimate above that the supply of California produced gas will be reduced in 1970 by approximately fifty percent ($608.2 - 328.2 = 280.0$ Mmcf).

The California Companies argue this estimated reduction is unwarranted because, in their opinion, considerably more gas could be produced from their fields for PG&E if the terms of the PG&E purchase contracts were modified. They allege that present production is governed by PG&E's takes under the minimum purchase provisions of their contracts whereas, it is alleged, prior to the certification of the original PGT import authorization PG&E purchased more than the minimum volumes provided by the contracts. They further allege that PG&E uses the California production for peaking, or swing, and if the sharp peaking provisions were removed from the contracts more gas would be available. PG&E's evidence shows the discoveries of dry gas in the California area, where it purchases gas, have been sporadic and that the discoveries have varied widely in Btu content. Therefore, PG&E says it cannot safely rely upon estimated, but yet undiscovered, reserves in its planning for the acquisition of additional gas to supply prospective firm requirements. The PG&E witness said it would not be prudent to speculate on the possibility of future discoveries of California reserves from which to supply its customers, therefore it must make commitments to purchase known and available out-of-state reserves. The PG&E witness indicated the cost of the California produced gas, adjusted to 1,000 Btu dry basis and delivered by PG&E to its load centers would amount to approximately 11.0 cents per Mcf more than the

Canadian gas similarly adjusted as to Btu, including the volumes here sought. Thus, if the importation of the first increment of 100,000 Mcf of Canadian gas were deferred for two years and California produced gas could be substituted, it was estimated the California customers of PG&E would be required to pay additional costs of some \$8,030,000. The Commission made it abundantly clear, in its Rock Springs opinion, *El Paso Natural Gas Company, et al.*, 1963, 30 FPC 77, that in weighing the merits of a proposed project, the incremental cost of the proposed deliveries should be of primary importance.

To summarize, the PG&E witness says it is their policy to make a market for California produced gas and that over the years they have paid what they thought was an adequate price,²⁹ negotiated with the producers, that gave consideration to the load factor at which it acquires gas from out-of-state sources and other factors. The price paid California producers is comparable to the cost of gas to PG&E from underground storage. Therefore, PG&E says it will continue to make a market for the California produced gas, in lieu of underground storage, at comparable costs.

The following data, from the record, indicate that PG&E must curtail some of its industrial load in 1970 or before. This data reflect PG&E's dependence on California production.

PG&E Peak Day Gas Supply
(Exhibit 17, p. 8 of 9)
MMcf

California production	1,321	1,047	765
El Paso	1,025	1,025	1,025

²⁴Upwards from 30.0 cents per Mcf at the wellhead.

PGT	454	665	665
Storage	242	442	510
	<hr/>		
Total	3,042	3,106	2,899 ²⁵

PG&E Peak Day Requirements
(Exhibit 18, p. 10)

MMcf		
1965	1968	1970
<hr/>	<hr/>	<hr/>
2,678	2,932	3,185

Approximately one-third of PG&E's interruptible industrial load is used in steam electric plants (Exhibit 18, p. 2). These would be the first to be curtailed. They are equipped to burn oil.

From all the testimony it is clear that PG&E will not require all of the usable²⁶ California gas available but also the volumes here sought to be imported to meet its reasonable anticipated future supply requirements. The Staff of the Commission arrived at this same conclusion in its brief (p. 19).

ENGINEERING FEASIBILITY

There was no issue raised as to the adequacy of the proposed additional facilities to render the service proposed by the PGT in its application.

DEPRECIATION ISSUE AND NET SALVAGE

Since the beginning of operations of its transmis-

²⁵The differences between these totals and the correct sum of the totals of the numbers in the column above them, represent the pipeline operating tolerances as shown on Exhibit 17, p. 8 of 9.

²⁶The Lathrop field has a maximum delivery in excess of the amount considered available, or usable, by PG&E. Because of its low—871—Btu content this gas must be blended with higher Btu gas to bring the weighted average Btu content up to delivery specifications of 1075 Btu for PG&E's market.

sion line, PGT has been charging depreciation expense as part of its cost of service at the rate of 4 percent annually. The 4 percent rate, applied to plant on a straight line basis, reflects the 25-year life of the Canadian export permits, which were originally due to expire on October 31, 1986.

This Commission in its original authorization (24 FPC 134) approved PGT's Rate Schedule PL-1 including the above 4 percent depreciation rate. It also provided as follows:

“At such time as the aforesaid export permit, export license, or both, are renewed, extended or supplemented or modified so as to prolong or shorten the authorized export period, the unrecovered cost of the said depreciable gas plant shall be determined and the annual depreciation expense redetermined by the same method. (Original Sheet No. 12 to Pacific Gas Transmission Company's Rate Schedule PL-1, Ex. 5, *Pacific Gas Transmission Company, et al., supra*, 24 FPC 134, 150).”

The Commission thereby furnished a formula for application in this present circumstance. The Canadian export permit is to be extended for three years to October 31, 1989 in conjunction with the additional 205,000 Mcf to be transported daily by PGT.

The California Public Utilities Commission strongly objects to the present depreciation practice of PGT now in force, even though the extended life of the project will cause a reduction in the depreciation rate from 4 percent to 3.7 percent (Tr. 1001).

The witness for the California Commission would revise the annual depreciation rate to 3.25 percent (Tr. 1003), after applying a 10 percent net salvage to PGT's

line. In effect, this witness would reduce the rate, conforming it with the longer life of the physical plant, and also reduce the dollar amount of plant by 10 percent, to which the depreciation rate is applied. In his view, to the extent of these reductions, the California consumers would no longer be overcharged for the cost of depreciating PGT's line.

The Commission's Staff, in finding agreement with the position of PGT's witness, *i.e.*, a slight reduction in the rate of 4 percent to 3.7 percent, due to extending the life of the Canadian permits, believe the best forum for attacking the company's costs is one under proceedings of Sections 4 and 5 of the Act, namely, a rate proceeding.

The Examiner approves the Staff position. Opening the issue of depreciation, beyond what the company proposes, suggests that consideration might need to be given to other items in the cost of service. The Commission has clearly expressed its view in the original certificate case regarding any subsequent adjustment to the depreciation allowance.

The Examiner believes the depreciation expense issue is technical in nature and modification or adjustment requires the more appropriate forum the Staff recommends.

The Examiner, therefore, concurs with the company's proposal herein without a judgment as to its merits.

THE IPAA PROGRAM FOR A MORATORIUM ON THE IMPORTS OF NATURAL GAS

The Independent Petroleum Association of America (IPAA), an intervenor, is a well-known national trade

association representing producers in every producing area in the United States. It opposes the issuance of an import certificate to PGT upon the theory that the importation of gas will decrease, or may even eliminate, the use of domestic gas, that the domestic suppliers of gas in District V²⁷ have, and will continue to increase unless imported gas crowds it out of the market and, finally, to grant this import request would depress the search for and the use of domestic gas in District V and for these reasons would not be consistent with the public interest under Section 3 of the Natural Gas Act.

IPAA urges restrictions be placed on natural gas imports similar to those of the Mandatory Oil Import Program contending that imports, especially in California, are increasing at a faster rate than the increase in production. It is argued that restrictions on imports would increase the income of domestic producers which would create an additional incentive to explore for new reserves.

The question concerning California reserves and production, as well as the wellhead price being paid the California producer and the assurances of PG&E that it will make a market for California production of gas have been considered in some detail in other parts of this decision. No one here disputes the need of PG&E for additional gas to meet its market requirements. No one except PGT presented an application for authorization to supply the additional market requirements of PG&E. It is true that the State of Texas and TIPRO offered testimony, which was excluded

²⁷Includes the States of Alaska, Arizona, California, Nevada, Oregon, Washington and Hawaii.

from this record, indicating they had shut-in gas wells and uncommitted reserves from which the PG&E market requirements could be supplied, but they offered no program for transporting this shut-in gas or uncommitted reserves to the PG&E market. That California is an energy deficient state, and that the California markets must necessarily look more and more to out-of-state production for its future energy requirements, has been the consistent theme of California distributor and consumer witnesses before this Commission for years past. Such is the uncontroverted testimony of PG&E on this record.

Section 3 of the Natural Gas Act provides that the Commission, upon application, shall issue its order authorizing the importation of natural gas into the United States from a foreign country if, after a hearing, it finds the importation is in the public interest. Here PGT has shown by a preponderance of the evidence the need of PG&E for the gas, of the unreliability of California production for PG&E's expanding market, together with the feasibility of transporting the additional proposed volumes through its existing pipeline.

The Mandatory Oil Import Program recognizes, as did this Commission in *PGT*, 24 FPC 134, the close and friendly relationship between Canada and the United States and therefore exempted imports of oil from Canada into District V. No reference was made to the importation of gas. The Commission's guidelines and standards for the importation of natural gas from Canada have been unmistakably stated in *North-west Natural Gas Company, et al*, 13 FPC 221, 235; *American Louisiana Pipe Line Company, et al.*, 13

PFC 221, 235; *American Louisiana Pipe Line Company, et al.*, 20 FPC 575, 591; *Pacific Gas Transmission Company, et al.*, 24 FPC 134, 135 and reaffirmed in its Opinion No. 486 in *The Montana Power Company*, issued February 8, 1966. Nothing is found in this record which would cause this Examiner to impose the conditions requested.

The Staff recommends, if this import application is approved, any future supplies of natural gas for the PG&E market should come from domestic sources so that there may be some balance between the sources of supply. The People of the State of California and the Public Utilities Commission of the State of California oppose this recommendation. They argue that a further increment of gas from PGT might be the most economical supply available to PG&E and, if the Staff recommendation were adopted, PG&E would be precluded from making the import purchase thus forcing PG&E to pay higher prices for domestic gas which would increase rates to consumers. The Examiner approves the California position against the imposition of the Staff recommendation.

The People of the State of California and the Public Utilities Commission of the State of California,²⁸ The Washington Utilities and Transportation Commission, the Idaho Public Utilities Commission, the Public Utility Commission of Oregon, the City and County of San Francisco,²⁹ the Southern California Gas Company, the Southern Counties Gas Company of California and the Pacific Lighting Gas Supply Company, each support the PGT application. The El

²⁸Except upon the issue of depreciation and net reserve.

²⁹*Ibid.*

Paso Natural Gas Company does not object to the granting of a certificate to PGT. The Staff "concludes that the public convenience and necessity requires the issuance of the certificate requested pursuant to the Natural Gas Act." (Staff Brief, p. 49, conclusion).

PRESIDENTIAL PERMIT

PGT also applies for a Presidential Permit for the construction, operation, maintenance and connection, at the International Boundary between Canada and the United States of the facilities for the importation of the additional quantities of natural gas from Canada which are required, or may be necessary, for the importation here proposed. The requisite facilities for the initial project were authorized by the Presidential Permit issued August 5, 1960, in Docket No. G-17352, *PGT*, 24 FPC 134, 143 Ordering Paragraph (D). The facilities there authorized are presently in use. The proposed expansion to increase imports by 200,000 Mcf per day will be accompanied by adding compressor capacity to the existing system. No other change or alteration of the existing facilities at the International Boundary is required.

Since the existing Presidential Permit, *supra*, grants permission to construct, operate, maintain, and connect the facilities therein described for the purpose of transporting natural gas across the International Boundary in the amount, at the rate, and in the manner there authorized by the Commission and, since the application here is for permission to transport an additional 200,000 Mcf per day through the same facilities, no amendment or additional Presidential Permit is required. *Midwestern Gas Transmission Company, et al.*,

1965, Opn. No. 469, p. 4, 33 FPC —; *The Montana Power Company*, Opn. 486, issued February 8, 1966.

FINDINGS AND CONCLUSIONS

Upon consideration of the entire record in this proceeding, the evidence adduced and the briefs filed, the Examiner finds and concludes, in addition to the findings and conclusions hereinabove stated, that:

- (1) The applicant, the Pacific Gas Transmission Company, is engaged in the transportation and sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission, and is therefore a "natural gas company" within the meaning of the Natural gas Act. See *Pacific Gas Transmission Company*, 24 FPC 134, Finding (5) p. 140.
- (2) The additional facilities proposed by Pacific Gas Transmission Company hereinabove referred to and more fully described in the Pacific Gas Transmission Company applications and the evidence herein, will be used in the transportation and sale of the additional quantities of natural gas in interstate commerce, subject to the jurisdiction of the Commission, and such additional facilities, together with the construction and operation thereof, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.
- (3) Pacific Gas Transmission Company has an adequate supply of natural gas committed to it which will enable it to render the service herein authorized.
- (4) The additional facilities proposed by Pacific Gas Transmission Company are adequate to

render the supplemental service herein proposed.

- (5) Pacific Gas Transmission Company is financially able to construct and operate the proposed additional facilities estimated to cost \$13,857,000.
- (6) A market exists for the proposed additional sales of natural gas by Pacific Gas Transmission Company to Pacific Gas and Electric Company.
- (7) The Pacific Gas Transmission Company plan for rendering the additional service to Pacific Gas and Electric Company is feasible.
- (8) Pacific Gas Transmission Company is able and willing, subject to the terms of this Order, properly to do the acts and perform the services proposed and to conform to the provisions of the Natural Gas Act, and the requirements, rules and regulations of the Commission promulgated thereunder.
- (9) The construction and operation of the facilities proposed by Pacific Gas Transmission Company and its sales and transportation of the additional quantities of natural gas, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are required by the present and future public convenience and necessity, and a certificate of public convenience and necessity should be issued therefor.
- (10) The proposed importation of the additional quantities of natural gas by Pacific Gas Transmission Company is subject to the jurisdiction of the Commission under the provisions of Section 3 of the Natural Gas Act.

- (11) The importation of the additional quantities of natural gas proposed by Pacific Gas Transmission Company in its application is appropriate and consistent with the public interest and should be authorized upon the terms and conditions of this Order.
- (12) The terms of the existing Presidential Permit issued to Pacific Gas Transmission Company on August 5, 1960, 24 FPC 134, sufficiently provide for the proposed additional imports and no amendment or additional Presidential Permit is required.

ORDER

WHEREFORE, IT IS ORDERED, subject to review by the Commission on appeal, or review by the Commission on its own motion, as provided in its Rules of Practice and Procedure, that:

- (A) An unconditioned certificate of public convenience and necessity is hereby issued to the Pacific Gas Transmission Company authorizing it to import from Canada an additional 100,000 Mcf per day of natural gas commencing on or about November 1, 1967 for transportation and sale to the Pacific Gas and Electric Company for resale, all as more fully described in the applications filed herein and the evidence received in these proceedings.
- (B) The unconditioned certificate of public convenience and necessity hereby issued is subject to the applicable terms and conditions of the Order of the Commission issued on August 5, 1960 to the *Pacific Gas Transmission Company, et al.*, 24 FPC 134.

HARRY W. FRAZEE
Presiding Examiner

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the matter of	)	Docket Nos. CP-213
Pacific Gas Transmission	)	CP-214
Company	)	CP-215

**APPLICATION OF THE STATE OF TEXAS
FOR SUBPENA DUCES TECUM OF
WITNESS BARRY HUNSAKER**

Comes now the State of Texas and respectfully requests the Presiding Examiner to issue a Subpena Duces Tecum to Barry Hunsaker of El Paso Natural Gas Company for the following reasons:

I.

The requested witness, Barry Hunsaker, is not a witness for the State of Texas, and can not be called unless this Subpena is issued.

II.

The testimony of the requested witness Barry Hunsaker will show to the Commission that El Paso Natural Gas Company has existing facilities and supplies to furnish at least 200 million cubic feet per day of natural gas to Northern California, even if all of its pending applications before the Federal Power Commission were granted.

III.

The testimony of the requested witness Hunsaker will show that the incremental costs of El Paso gas will be less than the incremental costs of the applicant in the above styled proceeding.

IV.

The testimony of the requested witness Barry Hunsaker is needed to provide the Federal Power Commission a complete record of possible alternative supply to the application here made under the rulings in Opinion No. 393 of the Commission and *City of Pittsburgh v. Federal Power Commission*, 237 F.2d 741.

V.

No witness is otherwise available to the State of Texas who possesses the knowledge and qualifications of Barry Hunsaker, and the State of Texas can not otherwise present the testimony and evidence needed in this proceeding.

Wherefore the State of Texas respectfully requests the Presiding Examiner to issue the attached Subpena Duces Tecum to Barry Hunsaker of El Paso Natural Gas Company.

Respectfully Submitted,
THE STATE OF TEXAS
WAGGONER CARR
Attorney General of Texas
LINWARD SHIVERS
Assistant Attorney General
C. L. SNOW, JR.
Assistant Attorney General
C. DANIEL JONES, JR.
Assistant Attorney General

September 16, 1965

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA)

VERIFICATION

LINWARD SHIVERS, being first duly sworn, on oath says that he is an Assistant Attorney General of the State of Texas, that he has signed the foregoing Application for Subpena Duces Tecum of Barry Hunsaker, that he is authorized to do so, and that all statements therein contained are true and correct to the best of his knowledge, information and belief.

LINWARD SHIVERS

Subscribed and sworn to before me this 16th day of September, 1965.

ANN G. LANZILATTA

Notary Public in and for the
City of Washington, District
of Columbia.

FPC Form 44

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Subpena Duces Tecum

In re: PACIFIC GAS TRANSMISSION

Docket Nos. CP65-213;

CP65-214, CP65-215

To BARRY HUNSAKER, EL PASO
NATURAL GAS COMPANY,
EL PASO, TEXAS

YOU ARE HEREBY required to appear before the Honorable HARRY W. FRAZEE, the Federal Power Commission, at 441 G Street NW in the city of Wash-

ington, D. C. on the 21st day of September, 1965, at 10:00 o'clock a.m. of that day, to testify concerning the availability of natural gas to Northern California through facilities of El Paso Natural Gas Company.

And you are hereby required to bring with you and produce at said time and place the following: All documents, work papers, memoranda and other written instruments relating to the above matters.

IN WITNESS WHEREOF, the undersigned, being duly and lawfully authorized so to do, has hereunto set his hand at Washington, D. C., this 16th day of September, 1965.

HARRY W. FRAZEE
Presiding Examiner

Fail not at your peril.

IN TESTIMONY WHEREOF, the seal of the Federal Power Commission has been affixed hereto this 16th day of September, 1965.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the matter of	)	Docket Nos. CP-213
Pacific Gas Transmission	)	CP-214
Company	)	CP-215

**MOTION OF THE STATE OF TEXAS TO
REVERSE RULING OF PRESIDING EXAMINER
AND ISSUE SUBPENA DUCES TECUM**

TO THE FEDERAL POWER COMMISSION:

Comes now the State of Texas and respectfully moves the Commission to reverse the rulings of the Presiding Examiner in this proceeding excluding the testimony of El Paso Natural Gas witness Barry Hunsaker and denying the issuance of a subpoena duces tecum to compel his testimony.

During the prehearing conference of these proceedings held on July 22, 1965, counsel for the State of Texas made available to the parties to this proceeding 20 pages of proposed testimony and 6 exhibits of Barry Hunsaker, Chief Pipeline Engineer for El Paso Natural Gas Company.

All parties to these hearings were advised that this evidence would be sought to be made a part of the record by reference in these proceedings which commenced on September 15, 1965.

Mr. Barry Hunsaker is the Chief Pipeline Engineer for El Paso Natural Gas Company, a party to these proceedings. El Paso Natural Gas Company is a major transporter of gas to California, for ultimate use both in southern California and northern California.

The evidence sought by the State of Texas to be presented by witness Hunsaker would show that there is an alternative method of supplying gas to California at a firm price and a cheaper price than the gas sought to be imported to California by the pending application.

Witness Hunsaker has made a study showing the cost of delivering an additional 325,000 Mcf/day through one of its existing pipelines to the California border at Topock. This study was presented in the Gulf Pacific hearings (Docket No. CP64-76) but there is no application pending based on this study. This supply is in excess of the Tailored Gas Supply Program applications made therein.

If required to testify, Mr. Hunsaker would present evidence showing that there is an alternative supply of gas available to Pacific Gas & Electric and that this alternative supply of gas would be available to Pacific Gas and Electric in volumes sufficient to fulfill P G & E's requirement for gas now sought to be supplied from the Canadian sources, at a cost less than the cost of P G & E's proposed additional Canadian supplies.

On August 16 and 27, motions were filed by the various California companies opposing making the evidence offered by the State of Texas through witness Hunsaker a part of the record. On August 23, 1965, and September 9, 1965, the State of Texas filed their reply in support of the inclusion of the proposed testimony and exhibits of witness Hunsaker. (Excerpts from these replies are attached and made a part hereof for the purpose of showing the State's position in requesting that the motions by the various California

companies to exclude the testimony and exhibits of Barry Hunsaker be denied.)

No objection to the introduction of this testimony was offered by Staff Counsel for the Commission.

At the opening of the hearings on September 15, 1965, the Presiding Examiner sustained the objections to the inclusion of proposed evidence of the State of Texas stating that (Tr. p. 139, 140) :

“The testimony and supporting exhibits sought to be incorporated herein was given in the Gulf Pacific matter by an employee of and witness for the El Paso Natural Gas Company by the name of Barry Hunsacker (sic). The record in Gulf Pacific has been closed and is presently under consideration by Examiner Kutrz. The testimony and supporting exhibits of the Witness Barry Hunsacker (sic) sought to be incorporated herein relate to the location, design and cost of facilities to enable El Paso to deliver an additional 325 Mcf per day of natural gas in the Gulf Pacific Case, as well as an additional 250 Mcf per day as proposed by El Paso in Docket No. CP64-76, which docket was also consolidated with the Gulf Pacific Matter.

“These volumes are to be delivered if certificated to the southern California companies for distribution by them to the southern California markets, not to the San Francisco or northern California markets for which Pacific Gas Transmission and P G & E herein seek additional supplies of gas.

“Motions were filed by the Pacific Gas Transmission Company, the Public Utilities Commission of California, the City and County of San Francisco and the Pacific Lighting Companies to exclude this testimony and the supporting exhibits of Barry Hunsacker (sic).

“Replies to these motions were filed by the State of Texas and by TIPRO. El Paso apparently knows nothing about this proposal of the State of Texas for there is no application here by El Paso for authorization to increase its pipeline capacity to transport this additional gas. It has, however, asked for authorization in CP63-204 and CP64-76, the Gulf Pacific Case, to increase its pipeline capacity to deliver an additional 575 Mcf per day, which appears to be its full capacity.

“Also the testimony sought to be incorporated herein relates to an entirely different project, with sources of supply and delivery points different from those here under consideration.

“This proposal to incorporate into this record the testimony concerning an entirely different project from a completely different record present an innovation to the rules of evidence.

“The motions to exclude the proposed testimony and supporting exhibits of the Witness Barry Hunsacker (sic) are sustained.”

The Presiding Examiner was in error in ruling that the evidence sought to be used by the State of Texas was evidence in the Gulf Pacific record (Docket No. CP64-76) to be used in support of a pending application.

As stated by the attorney for El Paso Natural Gas, Mr. Frank Reifsnnyder at page 427 of the transcript in this (PGT) hearing:

“This alternate showing that he made, which was not a part of El Paso’s application, showed the reinforcement of the existing system, and the engineering and the costs that would be sustained in order to accomplish that.”

The State of Texas broadened its original request for the presentation of evidence by reference of Witness Hunsaker to cover "alternative supplies of gas" and requested that the Presiding Examiner issue a subpoena duces tecum to require the production of Mr. Hunsaker's requested evidence. (A copy of the application for the subpoena and the subpoena are attached to and made a part hereof and references made thereto for the purpose of showing the grounds for issuance of a subpoena.)

After oral argument held before the Presiding Examiner on September 16, 1965, the request for subpoena to adduce the required information was denied.

The Examiner again erred in ruling that the evidence of Barry Hunsaker should not be secured by issuance of subpoena duces tecum. The State of Texas sought this subpoena for the purpose of showing the availability of natural gas to northern California through sources of supply and transmission facilities known to the witness Barry Hunsaker. The Examiner ruled at page 429 of the transcript as follows:

"There is no indication here by El Paso . . . that they have supplies of gas to sell in the northern California market . . . the application for a subpoena for the witness Barry Hunsaker is denied."

Briefly, not only is the testimony of witness Hunsaker highly relevant and material but it is in keeping with the holding in the *City of Pittsburgh v. Federal Power Commission*, 237 F 2d 741 (D. C. Cir. 1956) and the "*Rock Springs*" case, 30 FPC 77 (1963), that the Commission should consider alternative means to determine whether a particular proposal would serve the public convenience and necessity.

Accordingly, it is respectfully requested that the Presiding Examiner's rulings be reversed and that the testimony and exhibits of witness Hunsaker be made a part of the record in this proceeding, and that a subpoena issue to require witness Hunsaker to present evidence in these proceedings.

Respectfully submitted,

THE STATE OF TEXAS

WAGGONER CARR

Attorney General of Texas

C. L. SNOW, JR.

Assistant Attorney General

C. DANIEL JONES, JR.

Assistant Attorney General

LINWARD SHIVERS

Assistant Attorney General

CITY OF WASHINGTON)

DISTRICT OF COLUMBIA)

VERIFICATION

LINWARD SHIVERS, being first duly sworn, on oath says that he is an Assistant Attorney General of the State of Texas, that he has signed the foregoing motion to reverse ruling of Presiding Examiner and issue subpoena duces tecum, that he is authorized to do so, and that all statements therein contained are true and correct to the best of his knowledge, information and belief.

LINWARD SHIVERS

Subscribed and sworn to before me this 21st day of September, 1965.

ANN G. LANZILATTA

Notary Public in and for the
City of Washington, District
of Columbia

(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in these proceedings in accordance with the requirements of Section 1.17 of the Rules of Practice and Procedure.

Dated at Washington, D. C., this 21st day of September, 1965.

LINWARD SHIVERS

Excerpt from "REPLY OF THE STATE OF
TEXAS TO MOTIONS TO EXCLUDE TESTI-
MONY AND EXHIBITS OF STATE OF
TEXAS' WITNESSES BARRY HUNSAKER,
BOB R. HARRIS AND ARLEN EDGAR,
WITNESS FOR PBPA"

(Filed August 23, 1965)

I.

"Without restating the objections declaring the irrelevancy of the Hunsaker, Harris and Edgar testimony, certain facts are set forth for the benefit of the Examiner in clarifying the record.

"Hunsaker's testimony offered by incorporation by reference in this proceeding is not the testimony offered

in the Gulf Pacific Case in support of a then pending application or a subsequently filed application.

“El Paso made an Original Application to deliver an additional 250 M²cf/d via an *existing line* over and above the volume it was then transporting (Docket No. CP 64-76).

“El Paso made a First Amendment to its Original Application by preparing an *alternative* project to deliver, 575 M²cf/d via a *new line*, not intending to supercede the basic application of 250 M²cf/d, but as an alternative thereto.

“El Paso, also, at the request of the Pacific Lighting Companies, made a study of the possibility of delivering 325 M²cf/d in addition to the 250 M²cf/d proposed in the basic application via an *existing pipeline*. *however, El Paso did not file an application on this study.*

“Therefore, the testimony offered by Hunsaker is not testimony offered in support of an application, but is one of the contrary, an independent study relating to 325 M²cf/d through the existing pipeline in *addition* to the 250 M²cf/d originally applied for. The Hunsaker’s testimony incorporated by reference and his exhibits will show to the Examiner the cost of the additional facilities and that El Paso can deliver gas to the California-New Mexico border at around 22.5¢ per Mcf which is a competitive price with the foreign gas that the applicants in this hearing request to be brought in. This price could possibly be reduced even more as set out in the testimony of Mr. Moulton hereinafter quoted in this reply, and found in attached Exhibit A.

“It is undisputed that neither El Paso nor the State

of Texas have a competitive project to that of the applicants before the Examiner in this proceeding.”

Excerpt from “REPLY OF THE STATE OF TEXAS TO MOTIONS TO EXCLUDE TESTIMONY AND EXHIBITS OF BARRY HUNSAKER BY SOUTHERN CALIFORNIA GAS COMPANY, SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, AND PIPE LINE GAS SUPPLY COMPANY”

(Filed September 9, 1965)

I.

“It is undisputed that the testimony and exhibits of Barry Hunsaker were prepared by El Paso Natural Gas Company (El Paso) for proposed resale in *Southern California* in fact, and as stated in our original reply, the study was initiated at the request of these very proponents of this motion to exclude.

“The interesting fact obviously misunderstood by Southern Gas Company, et al., is that El Paso has two points of delivery at the Arizona-California line. One being at *Blythe* station which is used for southern California service. The second point of delivery is to the north of Blythe and is at *Topock*. The Topock station is primarily used for northern gas delivery.

“The study under which the testimony and exhibits offered was based on delivery at the Topock station.

“Therefore, it is inconceivable that the testimony and exhibits are not relevant to Northern California, because *if* El Paso were to deliver to Northern California the same station would be used—that being *Topock*.

II.

“It is further undisputed that El Paso is not an applicant for a competitive certificate in this proceeding. However, alternative service is not irrelevant and immaterial for the simple reason that the Examiner does not have to *select* an applicant based on a comparative showing. This Examiner has to grant or deny the one application, but in so doing he should be free and has the obligation to consider all relevant and material testimony and exhibits that tend to show a comparable and less costly alternative, *even though that alternative is not now seeking a competitive application.* (Rock Springs and City of Pittsburg; cited in original reply)”

Nat. Energy Bd.
Exhibit No. 50
April 6-8, 1965

PACIFIC GAS AND ELECTRIC COMPANY
245 Market Street
San Francisco 6, California

March 23, 1965

Westcoast Transmission Company Limited
1155 West Georgia Street
Vancouver 5, British Columbia

Gentlemen:

This is in reply to your letter of March 12, 1965, addressed jointly to Alberta and Southern Gas Co., Ltd., Pacific Gas Transmission Company, and Pacific Gas and Electric Company, offering to sell us 207,000 Mcf per day of natural gas at the southern terminus of your pipeline near Sumas, Washington, at an initial

price of 29 cents (U.S.) per Mcf, based on a 92% load factor.

We appreciate your submitting this offer to us, but we have already procured in Alberta a much more economic supply of gas in quantities that will meet our needs at least through 1967. The sum of your price, the estimated cost of moving the gas from Sumas to Pendleton, and the incremental cost of transmitting it from there to the San Francisco Bay area would be greatly in excess of the field price for our Alberta gas plus the incremental cost of transporting it to the San Francisco area through our existing Alberta-to-California pipeline.

Moreover, should we be prevented for any reason from taking the gas which we have purchased in Alberta, our alternative supply would be from the gas-producing areas of southwestern United States. The cost of gas from this source delivered to the San Francisco area would be much lower than the delivered cost of your gas.

We hope that you will be in a position at some future time to offer us a supply of gas at a competitive price. Any such offer would, I assure you, receive very serious consideration.

Yours very truly,
ROBERT H. GULER

RHG:S

**PACIFIC GAS AND ELECTRIC COMPANY
COMPARATIVE COSTS OF ADDITIONAL
OUT-OF-STATE GAS**

The following comparison of the incremental costs of additional out-of-state gas in the range of 200 M²cf

delivered at the California border has been prepared from sources hereinafter described.

	Range of Costs—Cents per Mcf
Alberta gas	21.65
Westcoast gas	30.8 to 32.3
El Paso gas	22.53

Alberta gas

The cost at the California-Oregon border is based on estimates prepared in connection with the plan now pending before the Canadian National Energy Board and the Federal Power Commission for an additional 100 M² cubic feet per day late in 1966 and a second 100 M² late in 1967. Since 1968 would be the first full year of operation for the entire increase, the incremental cost is for that year. This cost is the difference between the cost for that year (a) of 615 M² under an export permit expiring in November 1989 and (b) of 415 M² under a permit expiring in November 1986. The costs for 1969 and 1970 do not change appreciably. Table 1 shows the derivation of the incremental cost. The figures for 615 M² appear in tse P.G.T. application to F.P.C., Exhibit P (2) and for 415 M² from P.G.&E. work papers.

Westcoast gas

The range of costs and other derivation is shown on Table 2. The costs at Pendleton are those supplied by Westcoast. The transport cost from Pendleton to the California-Oregon border is a proration on the mileage basis of transport costs for 200 M² of Alberta gas from Kingsgate to the California border. The use of the incremental costs furnished by Westcoast for exchange between Sumas and Pendleton appears inconsistent

with F.P.C. practices of requiring the use of rolled-in costs. Such costs, while not furnished, would be higher than the incremental costs and would increase the costs shown at the California border.

El Paso gas

The source of the cost shown appears on Table 3. It has been assumed that El Paso would make 200 M² available to P.G.&E. out of its 575 M² project if that market became available to it.

P.G.&E. Transportation Costs

The estimated incremental costs of transporting 200 M² of additional gas from the Oregon border to Antioch, neglecting the other uses of this section of the Alberta-California line, is between 2" and 2.5¢.

The Topock-Milpitas lines would require some looping to handle 200 M² in addition to the present El Paso contract demand of 1025 M²cf per day (14.9¢ base). No engineering design nor cost estimate has been made for this increase. It appears to be within the range of reasonableness to assume that the unit incremental transportation cost would be some 5 to 6¢ per Mcf.

OF ALBERTA AND SOUTHERN GAS DELIVERED AT CALIFORNIA-OREGON BORDER

1968 Costs

	415 M ² CF/Day		615 M ² CF/Day		200 M ² CF/Day	
	Incremental Cost		Incremental Cost		Incremental Cost	
	Cost M\$	Volume M ² CF	Cost M\$	Volume M ² CF	Cost M\$	Volume M ² CF
Canadian Dollars						
Field Cost of Gas	28868	153300	42951	228100	14035	74800
Alberta and Southern Costs	725		734		9	
Alberta Gas Trunk Line Costs	9689		10127		438	
Cost Delivered to Alberta Natural Gas	39280	153300	53321	228100	14532	74800
Alberta Natural Gas Costs	3673		4407		734	
Costs Delivered to Pacific Gas Transportation	42953	153300	58219	223100	15266	74800
Less Portion Paid in U.S.\$	6567		6836		269	
Balance—Canadian \$	36386		51383		14997	
U.S. Dollars						
Balance in U.S. \$ at .925 Exchange	33657		47529		13872	
Total Cost to Pacific Gas Transmission	40224	153300	54365	228100	14141	74300
Deduct Pacific Gas Transmission Compressor Fuel	269	1024	836	3509	567	2435
Balance Pacific Gas Transmission Costs	39955	152276	53529	224591	13574	72315
Compressor Fuel	269		836		567	
Other	13413		14931		1518	
Total	13682	152276	15767	224591	2085	72315
Total at California-Oregon Border	53637	152276	69296	224591	15659	72315
						2.88
						21.65

INCREMENTAL COST OF 200 M³CF PER DAY OF WESTCOAST GAS DELIVERED TO CALIFORNIA-OREGON BORDER

	Case 1	Case 2
Price at Sumas	(a) 29.0¢/Mcf	(b) 28.1¢/Mcf
Westcoast prediction of El Paso exchange charge		
Sumas-Pendleton	(b) 1.7¢	(e) 1.1¢
Total at Pendleton (Stanfield tap)	30.7¢	29.2¢
Incremental P.G.T. transport cost to California-Oregon border	(c) 1.6¢	1.6¢
Total	32.3¢	30.8¢

Notes:

- (a) Price quoted by Mr. McMahon during October 8, 1964 meeting.
- (b) Price quoted at October 8, 1964 meeting and supported by undated table prepared by El Paso and furnished by Mr. Allyne. Table shows incremental cost of 1.65¢/Mcf for 100 M³. This cost is lower than costs for 50 M³ of 2.91¢, for 250 M³ of 2.92¢, for 350 M³ of 3.57¢ and for 400 M³ of 4.14¢.
- (c) Computed from P.G.T. application of F.P.C. and working papers:

		Thousands of Dollars				
1960 Costs	Vol. Calif. Border	Com- pres- sor Fuel	Other Costs	Total		Cost per Mcf
	Avg. Per Day					
	615	224,591	836	14,931	15,767	7.02¢
	415	152,276	269	13,413	13,682	8.98¢
	200	72,315	567	1,518	2,085	2.89¢

Kingsgate to California-Oregon border 613 miles
Stanfield to California-Oregon border 336 miles
Incremental cost Stanfield to California-Oregon border $2.98 \times \frac{336}{613} = 1.58¢$

- (d) Price at 100% load factor quoted in letter of November 17, 1964 from Mr. Allyne to Mr. Moulton.
- (e) Price from same letter, Case 4, 213 M³ from Fort Nelson.

EL PASO ESTIMATES OF COST OF GAS DELIVERED TO THE CALIFORNIA BORDER

Incremental Costs (a)

	Project			
	250 M ² /Day		575 M ² /Day	
	L.F.	Cost/Mcf¢	L.F.	Cost/Mcf¢
1968	91.66	20.57	95.0	22.66
1969	94.74	20.69	95.0	23.01
1970	98.3	20.05	95.0	22.69
Average 14.9¢ base	94.9	20.43		22.79
Average 14.73¢ base		20.2		22.53

Note: (a) I.N.G.A. Bulletin of November 1964 digest of Travis Petty testimony in El Paso et al F.P.C. hearings October 7-9, 1964.

UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

In the matter of	)	Docket Nos. CP-213
Pacific Gas Transmission	)	CP-214
Company	)	CP-215

APPLICATION OF THE STATE OF TEXAS FOR SUBPENA DUCES TECUM OF WITNESS BARRY HUNSAKER

Comes now the State of Texas and respectfully requests the Presiding Examiner to issue a Subpena Duces Tecum to Barry Hunsaker of El Paso Natural Gas Company for the following reasons:

I.

The requested witness, Barry Hunsaker, is not a witness for the State of Texas, and can not be called unless this Subpena is issued.

II.

The testimony of the requested witness Barry Hun-

saker will show to the Commission that El Paso Natural Gas Company has existing facilities and supplies to furnish at least 200 million cubic feet per day of natural gas to Northern California, even if all of its pending applications before the Federal Power Commission were granted.

III.

The testimony of the requested witness Hunsaker will show that the incremental costs of El Paso gas will be less than the incremental costs of the applicant in the above styled proceeding.

IV.

The testimony of the requested witness Barry Hunsaker is needed to provide the Federal Power Commission a complete record of possible alternative supply to the application here made under the rulings in Opinion No. 393 of the Commission and *City of Pittsburgh v. Federal Power Commission*, 237 F.2d 741.

V.

No witness is otherwise available to the State of Texas who possesses the knowledge and qualifications of Barry Hunsaker, and the State of Texas can not otherwise present the testimony and evidence needed in this proceeding.

Wherefore the State of Texas respectfully requests the Presiding Examiner to issue the attached Subpena Duces Tecum to Barry Hunsaker of El Paso Natural Gas Company.

Respectfully Submitted,

THE STATE OF TEXAS

WAGGONER CARR

Attorney General of Texas

September 16, 1965

LINWARD SHIVERS
Assistant Attorney General

C. L. SNOW, JR.
Assistant Attorney General

C. DANIEL JONES, JR.
Assistant Attorney General

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA)

VERIFICATION

LINWARD SHIVERS, being first duly sworn, on oath says that he is an Assistant Attorney General of the State of Texas, that he has signed the foregoing Application for Subpena Duces Tecum of Barry Hunsaker, that he is authorized to do so, and that all statements therein contained are true and correct to the best of his knowledge, information and belief.

LINWARD SHIVERS

Subscribed and sworn to before me this 16th day of September, 1965.

ANN G. LANZILATTA
Notary Public in and for the
City of Washington, District
of Columbia.

My Commission expires June 14, 1967.

FPC Form 44

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Subpena Duces Tecum

In re: PACIFIC GAS TRANSMISSION

Docket Nos. CP65-213;

CP65-214; CP65-215

To BARRY HUNSAKER, EL PASO
NATURAL GAS COMPANY,
EL PASO, TEXAS

YOU ARE HEREBY required to appear before the Honorable HARRY W. FRAZEE, Presiding Examiner, of the Federal Power Commission, at 441 G Street NW in the city of Washington, D. C. on the 21st day of September, 1965, at 10:00 o'clock a.m. of that day, to testify concerning the availability of natural gas to Northern California through facilities of El Paso Natural Gas Company.

And you are hereby required to bring with you and produce at said time and place the following: All documents, work papers, memoranda and other written instruments relating to the above matters.

IN WITNESS WHEREOF, the undersigned, being duly and lawfully authorized so to do, has hereunto set his hand at Washington, D. C., this 16th day of September, 1965.

HARRY W. FRAZEE
Presiding Examiner

Fail not at your peril.

IN TESTIMONY WHEREOF, the seal of the Federal Power Commission has been affixed this 16th day of September, 1965.

FEDERAL POWER COMMISSION

Washington, D. C. 20426

In reply refer to:

SEC

Docket Nos. CP65-213,

et al.

Pacific Gas Transmission
Company, *et al.*

The Attorney General of
the State of Texas

Box R, Capitol Station
Austin, Texas 78711

October 14, 1965

Dear Mr. Attorney General:

The motion of the State of Texas to reverse the ruling of the Presiding Examiner and issue subpoena duces tecum tendered for filing on September 21, 1965, has been construed as an appeal from Examiner's ruling and as such is hereby rejected.

Section 1.28(a) of the Rules of Practice and Procedure permits appeals to the Commission from the Presiding Examiner's ruling under extraordinary circumstances where prompt decision by the Commission is necessary to prevent detriment to the public interest and the examiner refers his ruling to the Commission for determination. The Presiding Examiner found "... no extraordinary circumstances here ... where a prompt decision on this question is required by the Commission or is necessary to prevent detriment to the public interest" (see Transcript Page 816), and thereby refused to certify to the Commission the ruling

which is the subject of the tendered filing. Moreover, the motion does not recite pressing reasons for immediate review of the Examiner's ruling by the Commission.

Copies of the rejected filing are returned herewith.

Very truly yours,

Joseph H. Gutride
Secretary

Enclosure No. 23706
cc: All Parties

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matter of the	)	Docket Nos. CP65-213
Application of Pacific	)	CP65-214
Gas Transmission Company	)	CP65-215

**APPLICATION FOR RECONSIDERATION AND
FOR WAIVER OF THE COMMISSION'S RULES, IF
NECESSARY, AND REQUEST FOR COMMISSION
DETERMINATION OF THE QUESTION OF
"EXTRAORDINARY CIRCUMSTANCES"**

TO THE HONORABLE FEDERAL POWER
COMMISSION:

Comes now the State of Texas in the above entitled and numbered matter, and respectfully applies for reconsideration by the Commission of a "rejection" emanating from the Federal Power Commission offices of this party's Motion directed to the Federal Power Commission To Reverse Ruling of Presiding Examiner and Issue Subpoena Duces Decum, and respectfully applies for waiver of the Commission's Rules, if necessary, and for a determination by the Commission of the question of "extraordinary circumstances" in connection with said Motion to the Commission; and, in support of the aforesaid application, submits the following:

I.

That on September 21, 1965 at 4:43 P.M. the State of Texas filed its Motion "To Reverse Ruling of Presiding Examiner and Issue Subpoena Duces Tecum," as evidenced by the Federal Power Commission file

mark thereon, which Motion, although a part of the Federal Power Commission file as aforesaid, was nevertheless returned to the State of Texas by the Secretary under letter of October 14, 1965.

Apparently, judging from the contents of said letter, the Secretary has "rejected" said Motion of the State of Texas and in so doing has passed on the merits of such pleading, which, the State of Texas submits, is arbitrary, presumptuous on the part of the Secretary, and wholly unauthorized by the Rules of Practice and Procedure Before the Federal Power Commission.

Said Motion bearing the following file mark: "Filed Office of the Secretary Sep 21 4:43 PM '65 Federal Power Commission," and a copy of said letter are attached hereto, marked Exhibits "A" and "B" respectively, and made a part hereof for all purposes.

The State of Texas has received no Commission Order either granting or denying its said Motion, nor has said Motion remained on file with the Commission for a period of 30 days awaiting Commission action, since it was extracted therefrom by the Secretary as aforesaid.

The Rules recognize situations of extraordinary circumstances requiring appeals to the Commission during the course of hearings. To take the position that the merits of such appeals can be passed on by the Secretary of the Commission where there is no referral by the Presiding Examiner is to shut the door on many such appeals themselves when a party firmly believes that a prompt decision by the Commission is necessary to prevent detriment to the public interest and furthermore is to ignore the spirit of the Rules, especially in

the light of the provisions of Section 1.28 thereof, wherein questions referred by Presiding Examiners to the Commission and appeals taken to the Commission from rulings of the Presiding Examiners are recognized together and wherein there is a mandatory requirement of referral to the Commission in extraordinary circumstances when a prompt decision is necessary to prevent detriment to the public interest and wherein there is no provision for any officer or party to determine the existence of such instances. It is therefore submitted that under the Rule, if a party to a proceeding appeals to the Commission in such instances, only the Commission itself can determine whether in fact such extraordinary circumstances exist as to require reversal of a ruling by a Presiding Examiner in order to prevent detriment to the public interest.

Conversely, the Rules do not provide, either in letter or spirit, for a "rejection" by the Secretary of a pleading and for removal and return to a party by the Secretary of a portion of a Federal Power Commission file.

II.

That the State of Texas, in support of its said Motion attached hereto as Exhibit "A" says that the true test of admission or exclusion of evidence in any Commission proceeding is one of relevancy and materiality. Section 1.26(a) of the Commission's Rules of Practice and Procedure requires all evidence to be admitted when pertinent to the issues in the proceeding except evidence which is unduly repetitious or cumulative or evidence which is "not of the kind which would affect

reasonable and fair-minded men in the conduct of their daily affairs.”

The State of Texas, by its Motion directed to the Commission, seeks to make the testimony and exhibits of the witness, Barry Hunsaker, a part of the record in this proceeding in order to show thereby that there is in fact a dependable, alternate method of supplying gas to California at a firm price and a price cheaper than the price of gas to be imported to California under the pending application.

Such evidence is material, relevant, confined squarely to the issues in this proceeding, and is the kind which would directly affect reasonable and fair-minded men in the conduct of their daily affairs if faced with deciding from which source to obtain additional gas for the Northern California market.

III.

That only when the aforesaid available evidence is made a part of the record herein can there be a consideration of the merits of said alternate source of gas and can true comparisons be made between the supply, cost and price of said alternate source of gas and the gas sought to be imported to California under the pending application.

IV.

That the State of Texas has sought to have the testimony, together with the exhibits in connection therewith, of the witness, Barry Hunsaker made a part of the record of this proceeding so that said testimony and exhibits can be considered and so that said witness can be cross-examined for the purpose of accurately and thoroughly completing the record, which completed

record, the State of Texas submits would evidence an alternate domestic supply of gas more desirable than the imported supply sought under the pending application.

V.

That the State of Texas, in appealing its said Motion directly to the Commission, is merely undertaking to have the relevant and material evidence of an alternate source of supply of gas, which can be gained from the testimony, exhibits and cross-examination of the witness, Barry Hunsaker, made a part of the record of this proceeding for consideration.

VI.

That if the aforementioned matters are not considered in this hearing at this time, a conclusion shall be reached and a ruling made in this hearing affecting literally millions of people in the San Francisco Bay Area and in fact many thousands more throughout Northern California without any consideration herein of the availability of gas from Texas for the California market, which may well be the cheapest and most desirable source of gas available to California at this time; and the State of Texas submits that the evidence sought by it for consideration would prove such proposition true. An exclusion of such evidence from this hearing will indeed result in a detriment to the public interest.

WHEREFORE, the Commission is respectfully requested to reconsider the aforesaid previous "rejection" of the State of Texas' Motion to Reverse Ruling of Presiding Examiner and Issue Subpoena Duces Tecum and to waive the Commission's Rules, if neces-

sary, and to determine the question of "extraordinary circumstances" with reference to said Motion; and, in connection therewith, to reverse the ruling of the Presiding Examiner and to issue the subpoena duces tecum, as requested in said Motion of the State of Texas attached hereto as Exhibit "A" and previously directed to the Honorable Commission.

Respectfully submitted,

WAGGONER CARR
Attorney General of Texas

C. L. SNOW, JR.
Assistant Attorney General

LINWARD SHIVERS
Assistant Attorney General

C. DANIEL JONES, JR.
Assistant Attorney General

STATE OF TEXAS
COUNTY OF TRAVIS

VERIFICATION

C. Daniel Jones, Jr., being first duly sworn says that he is an Assistant Attorney General of the State of Texas, that he has read the foregoing and is familiar with the contents thereof, that he has executed the same for and on behalf of the State of Texas and is authorized to do so, and that the facts set forth therein are true and correct to the best of his knowledge, information, and belief.

C. DANIEL JONES, JR.

Subscribed and sworn to before me this the 21st day
of October, 1965.

VIRGINIA OWENS
Notary Public in and for Travis
County, Texas

(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of Sec. 1.17 of the Rules of Practice and Procedure.

Dated Austin, Texas, this 21st day of October, 1965.

C. DANIEL JONES, JR.

EXHIBIT "A"

"Filed, Office of the
Secretary Sep 21 4:43 PM '65
Federal Power Commission"

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of	)	Docket Nos. CP65-213
Pacific Gas Transmission	)	CP65-214
Company	)	CP65-215

**MOTION OF THE STATE OF TEXAS TO
REVERSE RULING OF PRESIDING EXAMINER
AND ISSUE SUBPENA DUCES TECUM**

TO THE FEDERAL POWER COMMISSION:

Comes now the State of Texas and respectfully moves the Commission to reverse the rulings of the Presiding Examiner in this proceeding excluding the testimony of El Paso Natural Gas witness Barry Hunsaker and denying the issuance of a subpoena duces tecum to compel his testimony.

During the prehearing conference of these proceedings held on July 22, 1965, counsel for the State of Texas made available to the parties to this proceeding 20 pages of proposed testimony and 6 exhibits of Barry Hunsaker, Chief Pipeline Engineer for El Paso Natural Gas Company.

All parties to these hearings were advised that this evidence would be sought to be made a part of the record by reference in these proceedings which commenced on September 15, 1965.

Mr. Barry Hunsaker is the Chief Pipeline Engineer for El Paso Natural Gas Company, a party to these proceedings. El Paso Natural Gas Company is a major

transporter of gas to California, for ultimate use both in southern California and northern California.

The evidence sought by the State of Texas to be presented by witness Hunsaker would show that there is an alternative method of supplying gas to California at a firm price and a cheaper price than the gas sought to be imported to California by the pending application.

Witness Hunsaker has made a study showing the cost of delivering an additional 325,000 Mcf/day through one of its existing pipelines to the California border at Topock. This study was presented in the Gulf Pacific hearings (Docket No. CP64-76) but there is no application pending based on this study. This supply is in excess of the Tailored Gas Supply Program applications made therein.

If required to testify, Mr. Hunsaker would present evidence showing that there is an alternative supply of gas available to Pacific Gas & Electric and that this alternative supply of gas would be available to Pacific Gas and Electric in volumes sufficient to fulfill P G & E's requirement for gas now sought to be supplied from the Canadian sources, at a cost less than the cost of P G & E's proposed additional Canadian supplies.

On August 16 and 27, 1965, motions were filed by the various California companies opposing making the evidence offered by the State of Texas through witness Hunsaker a part of the record. On August 23, 1965, and September 9, 1965, the State of Texas filed their reply in support of the inclusion of the proposed testimony and exhibits of witness Hunsaker. (Excerpts from these replies are attached and made a part hereof for the purpose of showing the State's position in request-

ing that the motions by the various California companies to exclude the testimony and exhibits of Barry Hunsaker be denied.)

No objection to the introduction of this testimony was offered by Staff Counsel for the Commission.

At the opening of the hearings on September 15, 1965, the Presiding Examiner sustained the objections to the inclusion of proposed evidence of the State of Texas stating that (Tr. p. 139, 140):

“The testimony and supporting exhibits sought to be incorporated herein was given in the Gulf Pacific matter by an employee of and witness for the El Paso Natural Gas Company by the name of Barry Hunsacker (sic). The record in Gulf Pacific has been closed and is presently under consideration by Examiner Kurtz. The testimony and supporting exhibits of the Witness Barry Hunsacker (sic) sought to be incorporated herein relate to the location, design and cost of facilities to enable El Paso to deliver an additional 325 Mcf per day of natural gas in the Gulf Pacific Case, as well as an additional 250 Mcf per day as proposed by El Paso in Docket No. CP64-76, which docket was also consolidated with the Gulf Pacific Matter.

“These volumes are to be delivered if certificated to the southern California companies for distribution by them to the southern California markets, not to the San Francisco or northern California markets for which Pacific Gas Transmission and P G & E herein seek additional supplies of gas.

“Motions were filed by the Pacific Gas Transmission Company, the Public Utilities Commission of California, the City and County of San Francisco and the Pacific Lighting Companies to exclude this testimony and the supporting exhibits of Barry Hunsacker (sic).

“Replies to these motions were filed by the State of Texas and by TIPRO. El Paso apparently knows nothing about this proposal of the State of Texas for there is no application here by El Paso for authorization to increase its pipeline capacity to transport this additional gas. It has, however, asked for authorization in CP63-204 and CP64-76, the Gulf Pacific Case, to increase its pipeline capacity to deliver an additional 575 Mcf per day, which appears to be its full capacity.

“Also the testimony sought to be incorporated herein relates to an entirely different project, with sources of supply and delivery points different from those here under consideration.

“This proposal to incorporate into this record the testimony concerning an entirely different project from a completely different record present an innovation to the rules of evidence.

“The motions to exclude the proposed testimony and supporting exhibits of the Witness Barry Hunsacker (sic) are sustained.”

The Presiding Examiner was in error in ruling that the evidence sought to be used by the State of Texas was evidence in the Gulf Pacific record (Docket No. CP64-76) to be used in support of a pending application.

As stated by the attorney for El Paso Natural Gas, Mr. Frank Reifsnnyder at page 427 of the transcript in this (PGT) hearing:

“This alternate showing that he made, which was not a part of El Paso’s application, showed the reinforcement of the existing system, and the engineering and the costs that would be sustained in order to accomplish that.”

The State of Texas broadened its original request for the presentation of evidence by reference of Witness Hunsaker to cover "alternative supplies of gas" and requested that the Presiding Examiner issue a subpoena duces tecum to require the production of Mr. Hunsaker's requested evidence. (A copy of the application for the subpoena and the subpoena are attached to and made a part hereof and references made thereto for the purpose of showing the grounds for issuance of a subpoena.)

After oral argument held before the Presiding Examiner on September 16, 1965, the request for subpoena to adduce the required information was denied.

The Examiner again erred in ruling that the evidence of Barry Hunsaker should not be secured by issuance of subpoena duces tecum. The State of Texas sought this subpoena for the purpose of showing the availability of natural gas to northern California through sources of supply and transmission facilities known to the witness Barry Hunsaker. The Examiner ruled at page 429 of the transcript as follows:

"There is no indication here by El Paso . . . that they have supplies of gas to sell in the northern California market . . . the application for a subpoena for the witness Barry Hunsaker is denied."

Briefly, not only is the testimony of witness Hunsaker highly relevant and material but it is in keeping with the holding in the *City of Pittsburgh v. Federal Power Commission*, 237 F 2d 741 (D. C. Cir. 1956) and the "*Rock Springs*" case, 30 FPC 77 (1963), that the Commission should consider alternative means to determine whether a particular proposal would serve the public convenience and necessity.

Accordingly, it is respectfully requested that the Presiding Examiner's rulings be reversed and that the testimony and exhibits of witness Hunsaker be made a part of the record in this proceeding, and that a subpoena issue to require witness Hunsaker to present evidence in these proceedings.

Respectfully submitted,
THE STATE OF TEXAS
WAGGONER CARR
Attorney General of Texas
C. L. SNOW, JR.
Assistant Attorney General
C. DANIEL JONES, JR.
Assistant Attorney General
LINWARD SHIVERS
Assistant Attorney General

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA)

VERIFICATION

LINWARD SHIVERS, being first duly sworn, on oath says that he is an Assistant Attorney General of the State of Texas, that he has signed the foregoing motion to reverse ruling of Presiding Examiner and issue subpoena duces tecum, that he is authorized to do so, and that all statements therein contained are true and correct to the best of his knowledge, information and belief.

LINWARD SHIVERS

Subscribed and sworn to before me this 21st day of September, 1965.

ANN G. LANZILATTA

Notary Public in and for the
City of Washington, District
of Columbia

(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in these proceedings in accordance with the requirements of Section 1.17 of the Rules of Practice and Procedure.

Dated at Washington, D. C., this 21st day of September, 1965.

LINWARD SHIVERS

Excerpt from "REPLY OF THE STATE OF
TEXAS TO MOTIONS TO EXCLUDE TESTI-
MONY AND EXHIBITS OF STATE OF
TEXAS' WITNESSES BARRY HUNSAKER,
BOB R. HARRIS AND ARLEN EDGAR,
WITNESS FOR PBPA"

(Filed August 23, 1965)

I.

"Without restating the objections declaring the irrelevancy of the Hunsaker, Harris and Edgar testimony, certain facts are set forth for the benefit of the Examiner in clarifying the record.

"Hunsaker's testimony offered by incorporation by reference in this proceeding is not the testimony offered

in the Gulf Pacific Case in support of a then pending application or a subsequently filed application.

“El Paso made an Original Application to deliver an additional 250 M²cf/d via an *existing line* over and above the volume it was then transporting (Docket No. CP 64-76).

“El Paso made a First Amendment to its Original Application by preparing an *alternative* project to deliver, 575 M²cf/d via a *new line*, not intending to supercede the basic application of 250 M²cf/d, but as an alternative thereto.

“El Paso, also, at the request of the Pacific Lighting Companies, made a study of the possibility of delivering 325 M²cf/d in addition to the 250 M²cf/d proposed in the basic application via an *existing pipeline*, however, *El Paso did not file an application on this study*.

“Therefore, the testimony offered by Hunsaker is not testimony offered in support of an application, but is one of the contrary, an independent study relating to 325 M²cf/d through the existing pipeline in *addition* to the 250 M²cf/d originally applied for. The Hunsaker’s testimony incorporated by reference and his exhibits will show to the Examiner the cost of the additional facilities and that El Paso can deliver gas to the California-New Mexico border at around 22.5¢ per Mcf which is a competitive price with the foreign gas that the applicants in this hearing request to be brought in. This price could possibly be reduced even more as set out in the testimony of Mr. Moulton hereinafter quoted in this reply, and found in attached Exhibit A.

“It is undisputed that neither El Paso nor the State

of Texas have a competitive project to that of the applicants before the Examiner in this proceeding.”

Excerpt from “REPLY OF THE STATE OF
TEXAS TO MOTIONS TO EXCLUDE TESTI-
MONY AND EXHIBITS OF BARRY
HUNSAKER BY SOUTHERN CALIFORNIA
GAS COMPANY, SOUTHERN COUNTIES
GAS COMPANY OF CALIFORNIA, AND
PIPE LINE GAS SUPPLY COMPANY”

(Filed September 9, 1965)

I.

“It is undisputed that the testimony and exhibits of Barry Hunsaker were prepared by El Paso Natural Gas Company (El Paso) for proposed resale in *Southern* California in fact, and as stated in our original reply, the study was initiated at the request of these very proponents of this motion to exclude.

“The interesting fact obviously misunderstood by Southern Gas Company, et al., is that El Paso has two points of delivery at the Arizona-California line. One being at *Blythe* station which is used for southern California service. The second point of delivery is to the north of Blythe and is at *Topock*. The Topock station is primarily used for northern gas delivery.

“The study under which the testimony and exhibits offered was based on delivery at the Topock station.

“Therefore, it is inconceivable that the testimony and exhibits are not relevant to Northern California, because *if* El Paso were to deliver to Northern California the same station would be used—that being *Topock*.

II.

“It is further undisputed that El Paso is not an applicant for a competitive certificate in this proceeding. However, alternative service is not irrelevant and immaterial for the simple reason that the Examiner does not have to *select* an applicant based on a comparative showing. This Examiner has to grant or deny the one application, but in so doing he should be free and has the obligation to consider all relevant and material testimony and exhibits that tend to show a comparable and less costly alternative, *even though that alternative is not now seeking a competitive application.* (Rock Springs and City of Pittsburg; cited in original reply)”

Nat. Energy Bd.
Exhibit No. 50
April 6-8, 1965

PACIFIC GAS AND ELECTRIC COMPANY

245 Market Street
San Francisco 6, California

March 23, 1965

Westcoast Transmission Company Limited
1155 West Georgia Street
Vancouver 5, British Columbia

Gentlemen:

This is in reply to your letter of March 12, 1965, addressed jointly to Alberta and Southern Gas Co., Ltd., Pacific Gas Transmission Company, and Pacific Gas and Electric Company, offering to sell us 207,000 Mcf per day of natural gas at the southern terminus of your pipeline near Sumas, Washington, at an initial

price of 29 cents (U.S.) per Mcf, based on a 92% load factor.

We appreciate your submitting this offer to us, but we have already procured in Alberta a much more economic supply of gas in quantities that will meet our needs at least through 1967. The sum of your price, the estimated cost of moving the gas from Sumas to Pendleton, and the incremental cost of transmitting it from there to the San Francisco Bay area would be greatly in excess of the field price for our Alberta gas plus the incremental cost of transporting it to the San Francisco area through our existing Alberta-to-California pipeline.

Moreover, should we be prevented for any reason from taking the gas which we have purchased in Alberta, our alternative supply would be from the gas-producing areas of southwestern United States. The cost of gas from this source delivered to the San Francisco area would be much lower than the delivered cost of your gas.

We hope that you will be in a position at some future time to offer us a supply of gas at a competitive price. Any such offer would, I assure you, receive very serious consideration.

Very truly yours,
ROBERT H. GULER

RHG:S

PACIFIC GAS AND ELECTRIC COMPANY COMPARATIVE COSTS OF ADDITIONAL OUT-OF-STATE GAS

The following comparison of the incremental costs of additional out-of-state gas in the range of 200 M²cf

delivered at the California border has been prepared from sources hereinafter described.

	<u>Range of Costs—Cents per Mcf</u>
Alberta gas	21.65
Westcoast gas	30.8 to 32.3
El Paso gas	22.53

Alberta gas

The cost at the California-Oregon border is based on estimates prepared in connection with the plan now pending before the Canadian National Energy Board and the Federal Power Commission for an additional 100 M² cubic feet per day late in 1966 and a second 100 M² late in 1967. Since 1968 would be the first full year of operation for the entire increase, the incremental cost is for that year. This cost is the difference between the cost for that year (a) of 615 M² under an export permit expiring in November 1989 and (b) of 415 M² under a permit expiring in November 1986. The costs for 1969 and 1970 do not change appreciably. Table 1 shows the derivation of the incremental cost. The figures for 615 M² appear in tse P.G.T. application to F.P.C., Exhibit P (2) and for 415 M² from P.G.&E. work papers.

Westcoast gas

The range of costs and other derivation is shown on Table 2. The costs at Pendleton are those supplied by Westcoast. The transport cost from Pendleton to the California-Oregon border is a proration on the mileage basis of transport costs for 200 M² of Alberta gas from Kingsgate to the California border. The use of the incremental costs furnished by Westcoast for exchange between Sumas and Pendleton appears inconsistent

with F.P.C. practices of requiring the use of rolled-in costs. Such costs, while not furnished, would be higher than the incremental costs and would increase the costs shown at the California border.

El Paso gas

The source of the cost shown appears on Table 3. It has been assumed that El Paso would make 200 M² available to P.G.&E. out of its 575 M² project if that market became available to it.

P.G.&E. Transportation Costs

The estimated incremental costs of transporting 200 M² of additional gas from the Oregon border to Antioch, neglecting the other uses of this section of the Alberta-California line, is between 2" and 2.5¢.

The Topock-Milpitas lines would require some looping to handle 200 M² in addition to the present El Paso contract demand of 1025 M²cf per day (14.9¢ base). No engineering design nor cost estimate has been made for this increase. It appears to be within the range of reasonableness to assume that the unit incremental transportation cost would be some 5 to 6¢ per Mcf.

OF ALBERTA AND SOUTHERN GAS DELIVERED AT CALIFORNIA-OREGON BORDER

1968 Costs

	415 M ² CF/Day		615 M ² CF/Day		200 M ² CF/Day Incremental Cost	
	Cost M\$	Volume M ² CF	Cost M\$	Volume M ² CF	Cost M\$	Volume Cost M ² CF Per Mcf
Canadian Dollars						
Field Cost of Gas.....	28366	153300	42951	228100	14085	74800 18.83
Alberta and Southern Costs.....	725725		734		9	
Alberta Gas Trunk Line Costs.....	9689		10127		438	
Cost Delivered to Alberta Natural Gas.....	39280	153300	53321	228100	14532	74800 19.43
Alberta Natural Gas Costs.....	3673		4407		734	
Cost Delivered to Pacific Gas Transportation.....	42953	153300	58219	228100	15266	74800 20.41
Less Portion Paid in U.S.\$.....	6567		6836		269	
Balance—Canadian \$.....	36386		51383		14997	
U.S. Dollars						
Balance in U.S.\$ at .025 Exchange	33657		47529		13872	
Total Cost to Pacific Gas Transmission.....	40224	153300	54365	228100	14141	74300 18.91
Deduct Pacific Gas Transmission Compressor Fuel.....	269	1024	836	3500	567	2435 22.82
Balance.....	39955	152276	53529	224591	13574	72315 18.77
Pacific Gas Transmission Costs						
Compressor Fuel.....	269		336		567	
Other.....	13413		14931		1513	
Total.....	13682	152276	15767	224591	2085	72315 2.88
Total at California-Oregon Border.....	53637	152276	69296	224591	15659	72315 21.65

INCREMENTAL COST OF 200 M²CF PER DAY OF WESTCOAST GAS DELIVERED TO CALIFORNIA-OREGON BORDER

	Case 1	Case 2
Price at Sumas	(a) 29.0¢/Mcf	(d) 28.1¢/Mcf
Westcoast prediction of El Paso exchange charge		
Sumas-Pendleton	(b) <u>1.7¢</u>	(e) <u>1.1¢</u>
Total at Pendleton (Stanfield tap)	30.7¢	29.2¢
Incremental P.G.T. transport cost to California-Oregon border	(c) <u>1.6¢</u>	<u>1.6¢</u>
Total	32.3¢	30.8¢

Notes:

- (a) Price quoted by Mr. McMahon during October 8, 1964 meeting.
- (b) Price quoted at October 8, 1964 meeting and supported by undated table prepared by El Paso and furnished by Mr. Allyne. Table shows incremental costs of 1.65¢/Mcf for 100 M². This cost is lower than costs for 50 M² of 2.91¢, for 250 M² of 2.92¢, for 350 M² of 3.57¢ and for 400 M² of 4.14¢.
- (c) Computed from P.G.T. application to F.P.C. and working papers:

Thousands of Dollars						
1960 Costs	Vol. Calif. Border		Com- pres- sor Fuel	Other Costs	Total	Cost per Mcf.
	Avg. Per Day	Annual				
	615	224,591	836	14,931	15,767	7.02¢
	415	151,276	269	13,413	13,682	8.98¢
	200	72,315	567	1,518	2,085	2.89¢
Kingsgate to California-Oregon border						613 miles
Stanfield to California-Oregon border						336 miles
Incremental cost Stanfield to California-Orgeon border						
						$2.89 \times \frac{336}{613} = 1.58¢$

- (d) Price at 100% load factor quoted in letter of November 17, 1964 from Mr. Allyne to Mr. Moulton.
- (e) Price from same letter, Case 4, 213 M² from Fort Nelson.

EL PASO ESTIMATES OF COST OF GAS DELIVERED TO THE CALIFORNIA BORDER

Incremental Costs (a)

	Project			
	250 M ² /Day		575 M ² /Day	
	L.F.	Cost/Mcf¢	L.F.	Cost/Mcf¢
1968	91.66	20.57	95.0	22.66
1969	94.74	20.69	95.0	23.01
1970	98.3	20.05	95.0	22.69
Average 14.9¢ base	94.9	20.43		22.79
Average 14.73¢ base		20.2		22.53

Note: (a) I.N.G.A. Bulletin of November 1964 digest of Travis Petty testimony in El Paso et al F.P.C. hearings October 7-9, 1964.

UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

In the matter of	)	Docket Nos. CP-213
Pacific Gas Transmission	)	CP-214
Company	)	CP-215

APPLICATION OF THE STATE OF TEXAS FOR SUBPENA DUCES TECUM OF WITNESS BARRY HUNSAKER

Comes now the State of Texas and respectfully requests the Presiding Examiner to issue a Subpena Duces Tecum to Barry Hansaker of El Paso Natural Gas Company for the following reasons:

I.

The requested witness, Barry Hunsaker, is not a witness for the State of Texas, and can not be called unless this Subpena is issued.

II.

The testimony of the requested witness Barry Hunsaker will show to the Commission that El Paso Natural Gas Company has existing facilities and supplies to furnish at least 200 million cubic feet per day of natural gas to Northern California, even if all of its pending applications before the Federal Power Commission were granted.

III.

The testimony of the requested witness Hunsaker will show that the incremental costs of El Paso gas will be less than the incremental costs of the applicant in the above styled proceeding.

IV.

The testimony of the requested witness Barry Hunsaker is needed to provide the Federal Power Commission a complete record of possible alternative supply to the application here made under the rulings in Opinion No. 393 of the Commission and *City of Pittsburgh v. Federal Power Commission*, 237 F.2d 741.

V.

No witness is otherwise available to the State of Texas who possesses the knowledge and qualifications of Barry Hunsaker, and the State of Texas can not otherwise present the testimony and evidence needed in this proceeding.

Wherefore the State of Texas respectfully requests the Presiding Examiner to issue the attached Subpena

Duces Tecum to Barry Hunsaker of El Paso Natural Gas Company.

Respectfully Submitted,
THE STATE OF TEXAS
WAGGONER CARR
Attorney General of Texas
LINWARD SHIVERS
Assistant Attorney General
C. L. SNOW, JR.
Assistant Attorney General
C. DANIEL JONES, JR.
Assistant Attorney General

September 16, 1965

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA)

VERIFICATION

LINWARD SHIVERS, being first duly sworn, on oath says that he is an Assistant Attorney General of the State of Texas, that he has signed the foregoing Application for Subpena Duces Tecum of Barry Hunsaker, that he is authorized to do so, and that all statements therein contained are true and correct to the best of his knowledge, information and belief.

LINWARD SHIVERS

Subscribed and sworn to before me this 16th day of September, 1965.

ANN G. LANZILATTA
Notary Public in and for the
City of Washington, District
of Columbia.

My Commission expires June 14, 1967.

FPC Form 44

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Subpena Duces Tecum

In re: PACIFIC GAS TRANSMISSION

Docket Nos. CP65-213;

CP65-214; CP65-215

To BARRY HUNSAKER, EL PASO
NATURAL GAS COMPANY,
EL PASO, TEXAS

YOU ARE HEREBY required to appear before the Honorable HARRY W. FRAZEE, Presiding Examiner, of the Federal Power Commission, at 441 G Street NW in the city of Washington, D. C. on the 21st day of September, 1965, at 10:00 o'clock a.m. of that day, to testify concerning the availability of natural gas to Northern California through facilities of El Paso Natural Gas Company.

And you are hereby required to bring with you and produce at said time and place the following: All documents, work papers, memoranda and other written instruments relating to the above matters.

IN WITNESS WHEREOF, the undersigned, being duly and lawfully authorized so to do, has hereunto set his hand at Washington, D. C., this 16th day of September, 1965.

HARRY W. FRAZEE
Presiding Examiner

Fail not at your peril.

IN TESTIMONY WHEREOF, the seal of the Federal Power Commission has been affixed this 16th day of September, 1965.

EXHIBIT "B"
FEDERAL POWER COMMISSION
Washington, D. C. 20426

In reply refer to:
SEC
Docket Nos. CP65-213,
et al.
Pacific Gas Transmission
Company, *et al.*

The Attorney General of
the State of Texas
Box R, Capitol Station
Austin, Texas 78711

Dear Mr. Attorney General:

The motion of the State of Texas to reverse the ruling of the Presiding Examiner and issue subpoena duces tecum tendered for filing on September 21, 1965, has been construed as an appeal from Examiner's ruling and as such is hereby rejected.

Section 1.28(a) of the Rules of Practice and Procedure permits appeals to the Commission from the Presiding Examiner's ruling under extraordinary circumstances where prompt decision by the Commission is necessary to prevent detriment to the public interest and the Presiding Examiner found ". . . no extraordinary circumstances here . . . where the prompt decision on this question is required by the Commission or is necessary to prevent detriment to the public interest" (see Transcript Page 816), and thereby refused to certify to the Commission the ruling which is the subject

of the tendered filing. Moreover, the motion does not recite pressing reasons for immediate review of the Examiner's ruling by the Commission.

Copies of the rejected filing are returned herewith.

Very truly yours,

Joseph H. Gutride
Secretary

Enclosure No. 23706

cc: All Parties

THE ATTORNEY GENERAL
OF TEXAS

Austin 11, Texas

October 21, 1965

Air Mail
Certified Mail

Mr. Joseph H. Gutride, Secretary
Federal Power Commission
441 G Street Northwest
Washington, D. C. 20426

Re: In the Matter of the Pacific
Gas Transmission Company,
Docket Nos. CP65-213, CP65-214
and CP65-215

Dear Sir:

Please find enclosed the original and nineteen (19) copies of the following pleading, which we ask that you file and hand to the Commission for consideration in order that the Commissioners may pass on the merits of same, towit:

Application For Reconsideration And For
Waiver Of The Commission's Rules, If Nec-
essary, And Request for Commission Deter-
mination of the Question of "Extraordinary
Circumstances."

The filing and consideration by the Commission of the aforementioned pleading are necessitated by the "rejection," presumably by the Secretary, of our prior Motion in the captioned matter directed to the Commission itself and the return to our offices of said Mo-

tion by the Secretary long after said Motion had become a part of the captioned file, as indicated by the Federal Power Commission file mark thereon dated September 21, 1965, at 4:43 P.M. We submit that a return to our offices of a filed pleading of the State of Texas is somewhat presumptuous on the part of the Secretary, to say the least, and a "rejection" of same is wholly unauthorized under the rules.

In that connection, the State of Texas has not received any Commission Order whatsoever granting or denying its said Motion nor has said Motion remained on file with the Commission for a period of thirty (30) days awaiting Commission action. The State of Texas has merely been informed by letter from the Secretary that its Motion "has been construed as an appeal from Examiner's ruling and as such is hereby rejected." The identity of the "construer" has remained a mystery; however, the letter on its face is not an Order of and does not reflect action by the Commission.

Hence, we enclose the aforementioned application accompanied by the foregoing request.

Very truly yours

C. DANIEL JONES, JR.

Assistant tAttorney General

CDJ/fb

encl.

cc Commissioner, Joseph C. Swidler, Chairman

cc Commissioner, L. J. O'Connor, Jr.

cc Commissioner, Charles E. Ross

cc Commissioner, David S. Black

cc Commissioner, Carl E. Bagge

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman;
Charles R. Ross, David S.
Black, and Carl E. Bagge.

Docket. Nos.

CP65-213

Pacific Gas Transmission Company)

CP65-214

CP65-215

**ORDER DENYING RECONSIDERATION,
WAIVER OF THE COMMISSION'S RULES AND
MAKING DETERMINATION OF THE QUESTION
OF "EXTRAORDINARY CIRCUMSTANCES"**

(Issued December 17, 1965)

On October 22, 1965, and October 26, 1965, the State of Texas (Texas) and the California Gas Producers Association, The Oil Producers Agency of California and the Jade Oil and Gas Company [California Gas Producers] requested that the Commission reconsider its rejection of the motion that they had previously directed to it requesting a reversal of rulings made by the Presiding Examiner denying the issuance of subpoenas duces tecum.¹

The above-described Movants also requested that

¹The Independent Petroleum Association of America, The Texas Independent Producers and Royalty Owners Association, The West Central Texas Oil and Gas Association and The Permian Basin Petroleum Association joined in the motions for reconsideration filed by Texas and California Producers Association. For the purposes of this order all of the aforementioned parties either sponsoring or supporting the aforesaid applications for reconsideration will be referred to as Movants.

the Commission waive its rules, if necessary, and that the Commission determine the question of whether there exists, as they allege, extraordinary circumstances, that warrant the Commission's acting upon the appeal taken by them from the Presiding Examiner's rulings.

Section 1.28(a) of the Commission's Rules of Practice and Procedure provides that "Rulings of Presiding Officers may not be appealed from during the course of hearings except in extraordinary circumstances where prompt decision by the Commission is necessary to prevent detriment to the public interest * * *"

At a prehearing conference held on July 22, 1965, Texas advised that certain testimony and exhibits submitted by Barry Hunsaker, Chief Pipeline Engineer for El Paso Natural Gas Company (El Paso), in the Gulf Pacific hearings (Docket No. CP64-76) would be sought and that it would endeavor to have these made part of the records in these proceedings.

Texas alleged that it could show through the presentation of this Witness that there is an alternative method of supplying gas to California at a firm price and a cheaper price than the gas sought to be imported into California under the pending application.

At the same prehearing conference the California Gas Producers also advised that they sought certain testimony proffered by the Witness McKinney in the Gulf Pacific hearings, *supra*. The Witness McKinney purportedly testified in the Gulf Pacific hearing that if the Gulf Pacific Project were approved by the Commission, The Pacific Lighting Companies would cut-

back on their purchase of gas from El Paso and Transwestern Pipeline Company (Transwestern). California Gas Producers contend that the testimony of the Witness McKinney would show that this cut-back would be large enough to afford Pacific Gas and Electric Company (P.G.&E.) with an alternate supply of gas that could be readily substituted for the Canadian importation of natural gas proposed herein (pg. 2 of California Gas Producers motion filed September 21, 1965). They further allege in the latter motion that these additional supplies of natural gas would be available to P.G. & E. at a lower cost than the proposed Canadian supply of natural gas.²

On September 16, 1965, the Presiding Examiner, after hearing oral argument, denied the request of Texas and The California Gas Producers for the issuance of subpoenas duces tecum with respect to the aforementioned witnesses and certain material they presented in the Gulf Pacific hearings.

On September 21, 1965, the above-noted Movants requested that the Presiding Examiner certify his ruling denying their request for the issuance of subpoenas duces tecum for the Witness Hunsaker and McKinney to the Commission. This request was denied by the Presiding Examiner.

²California Gas Producers point out in their motion that El Paso's Rate Schedule G-X (Excess Gas Service) would be available to P.G. & E., because of the cut-backs envisaged by McKinney's testimony. They claim that the rate chargeable under such excess gas service is 22.22 cents per Mcf (14.73 psia). They also point out that Transwestern's Rate Schedules, covering deliveries of gas to California make provision for a rate of 21 cents for deliveries that are cut-back by The Pacific Lighting Companies (Transwestern LX Gas).

On the same date, the above Movants filed a motion with the Commission requesting it to reverse the ruling of the Presiding Examiner and to issue the subpoenas duces tecum as requested.

By letter dated October 15, 1965, the Secretary of the Commission rejected the motions to reverse the Ruling of the Presiding Examiner. The Secretary in his letters to these movants rejecting their motions stated:

* * * The Presiding Examiner found "... no extraordinary circumstances here ... where a prompt decision on this question is required by the Commission or is necessary to prevent detriment to the public interest" (See Transcript Page 816), and thereby refused to certify to the Commission the ruling which is the subject of the tendered filing. Moreover, the motion does not recite pressing reasons for immediate review of the Examiner's ruling by the Commission.

Thereafter, Texas on October 22, 1965, and the California Gas Producers on October 26, 1965, filed applications for reconsideration of the rejection of its motion to reverse the Ruling of the Presiding Officer and to issue subpoenas duces tecum as requested.

We have examined the pleadings relating to the motion and see nothing therein which would justify our intercession in the normal processes of the hearing. The determination of whether material sought to be secured by subpoena bears sufficient materiality and relevance is a matter on which the hearing examiner will normally be much better equipped to pass. Our intercession may occasionally be warranted where the examiner's ruling reflects a misunderstanding as to the

scope of the proceeding or where there are extraordinary circumstances which require avoidance of any possibility of delay in the event the examiner's ruling were to be found to be erroneous. Nothing of the kind is involved here. We note that the movants, with the approval of the examiner, have made an offer of proof with respect to the testimony which is the subject of the motion. It will be available for our consideration when the case comes before us for decision. We are of the opinion that this is the proper way to handle the matter.

The Commission finds:

(1) Movants have not demonstrated the existence of any pressing reasons that require a waiver of the Commission's rules.

(2) Movants have failed to establish the existence of extraordinary circumstances contemplated by Section 1.28(a) of the Commission's Rules of Practice and Procedure that warrant an appeal by them to the Commission of the aforementioned rulings of the Presiding Examiner in the instant proceedings.

(3) The public convenience and necessity requires that the applications for reconsideration filed herein with the Commission by the Movants be denied in all respects.

The Commission orders:

(A) The request by Movants for a waiver of the Commission Rules is denied.

(B) The request for reconsideration of the rejection

tion of motions filed by Movants with the Commission for a reversal of rulings made by the Presiding Examiner is denied.

By the Commission.

(S E A L)

Joseph H. Gutride,
Secretary.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Carl E. Bagge, Acting Chairman;
L. J. O'Connor, Jr.,
Charles R. Ross, and David S. Black.

Docket Nos.

CP-65-213

Pacific Gas Transmission Company)

CP65-214

CP65-215

**ORDER DENYING APPLICATIONS FOR
REHEARING**

(Issued August 4, 1966)

On June 15, 1966, the Commission issued Opinion No. 495 in this proceeding. A certificate of public convenience and necessity was thereby issued to Pacific Gas Transmission Company (PGT) authorizing it to import from Canada an additional 100,000 Mcf of natural gas commencing on or about November 1, 1966, and an additional 100,000 Mcf of natural gas commencing on or about November 1, 1967 for transportation and sale to the Pacific Gas and Electric Company (PG&E) in California. Applications for rehearing of Opinion No. 495 and its accompanying order were filed July 8, 1966 by the State of Texas (Texas), July 11, 1966 by Texas Independent Producers and Royalty Owners Association, West Central Texas Oil and Gas Association, and Permian Basin Petroleum Association (collectively called TIPRO, *et al.*), and July 12, 1966, by California Gas Producers Association, Oil Producing Agency of California, and Jade Oil and Gas Company (collectively called California Producers).

The applicants reiterate the positions taken by them before the Commission decision embodied in Opinion No. 495.

Texas urges that the record establishes the inadequacy of the Canadian gas supplies, including possible limitation on exports by the Canadian government. Texas further argues that the Commission erred because a portion of the Canadian gas is sold under contracts containing price escalation clauses, and in failing to subpoena testimony to establish that gas could be furnished from West Texas more cheaply than the Canadian gas.

TIPRO, *et al.*, also argue the Commission erred in failing to subpoena the testimony referred to and in allowing price escalation provisions in Canadian contracts. TIPRO, *et al.* contend the record shows that cheaper and more dependable gas will be available to Northern California and that the Commission erred in finding a market exists for the sales to PG&E. TIPRO, *et al.*, further argue that there is no present need to utilize the present PGT pipeline facilities to full capacity, and that, in any event, certain conditions proposed by the Commission staff to limit price escalation should have been adopted.

California Producers urge the Commission erred in failing to consider (1) PG&E's estimated cut-backs of California-produced gas to provide a market for the Canadian gas, (2) the impact of certification of the then-pending Gulf Pacific project on PG&E's available supplies, (3) the impact upon the Mandatory Oil Import Program, and (4) the availability of alternative supplies from other pipelines.

All these matters were fully argued by the applicants and considered by the Commission prior to its determination in Opinion No. 495, and no useful purpose would be served by further discussion of them.

The Commission finds:

The assignments of error and grounds for rehearing present no facts or legal principles which would warrant any change or modification in the Commission's Opinion No. 495 and accompanying order.

The Commission orders:

The above-described applications for rehearing of Opinion No. 495 and its accompanying order are denied.

By the Commission.

(S E A L)

Joseph H. Gutride,
Secretary.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

Nos. 21310, 21313, 21314

CALIFORNIA GAS PRODUCERS ASSOCIATION, INDEPENDENT OIL
AND GAS PRODUCERS OF CALIFORNIA, JADE OIL AND GAS
COMPANY, STATE OF TEXAS, TEXAS INDEPENDENT PRO-
DUCERS AND ROYALTY OWNERS ASSOCIATION, WEST CEN-
TRAL TEXAS OIL AND GAS ASSOCIATION AND PERMIAN
BASIN PETROLEUM ASSOCIATION, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

**BRIEF AMICUS CURIAE
OF
INDEPENDENT PETROLEUM ASSOCIATION
OF AMERICA**

FILED

DEC 27 1966

WM. B. LUCK, CLERK

L. DAN JONES,
General Counsel

WILLIAM I. POWELL,
Assistant General Counsel
1110 Ring Building
Washington, D. C. 20036

December 12, 1966

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IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

Nos. 21310, 21313, 21314

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BASIN PETROLEUM ASSOCIATION, *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

BRIEF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Independent Petroleum Association of America (IPAA), in filing this Amicus Curiae Brief in support of Petitioners herein, sets forth that it is a non-profit organization, incorporated under the laws of the State of Oklahoma and is a national trade association representing independent oil and natural gas producers.

The membership of IPAA consists of some 5,000 individuals, partnerships and corporations who are engaged in all branches of the oil and natural gas producing industry with membership in every oil and natural gas producing area in the United States, including the areas that produce and furnish natural gas, from sources within the United States, to California.

INTRODUCTORY STATEMENT¹

This case is important to the future health and strength of the domestic oil and natural gas producing industry.

The volumes of imports of natural gas from Canada which were approved by Respondent herein are of such a magnitude that they will have a depressant effect upon the exploration for and development of domestic natural gas and oil reserves, and the use of domestic natural gas and oil in the State of California.

Increasing imports of natural gas adversely affect the domestic oil and natural gas producing industry in several ways as follows:

1. Supplant the production of domestic gas.
2. Create additional natural gas liquids production which naturally seeks a market in the United States.
3. Supplant the market for domestic liquid petroleum products.
4. Restrict the accumulation of capital funds by domestic producers and discourage the reinvestment of such funds for use in the search for additional domestic oil and gas reserves.

The production of natural gas and the production of liquid petroleum are two branches of one industry and the

¹ The Statement of the case is set forth in the briefs of the parties and is not duplicated here.

activities of each are inseparable. That which adversely affects one also adversely affects the other. Thus increasing imports of natural gas are having a growing adverse effect on the over-all domestic oil and natural gas producing industry.

IPAA is not opposed to natural gas imports per se. It is our position that natural gas imports, as will be developed further later herein, should be permitted to increase but at a percentage growth rate no greater than the growth rate of domestic production of natural gas.

ARGUMENT

I. Respondent Erred in Finding That the Additional Imports of Natural Gas Herein Were Appropriate and Consistent With the Public Interest

Section 3² of the Natural Gas Act authorizes the Federal Power Commission to permit the importation of natural gas only when such imports will be "consistent with the public interest."

In making its public interest determination with respect to natural gas imports, Respondent must address itself to the following questions:

1. Is it in the public interest to have an important consuming area in the United States, such as is involved herein, became overly dependent on foreign gas for its required supply?

2. Is it in the public interest for Respondent, by its actions herein, to subject U. S. consumers to the jurisdiction of a foreign country for their supply of natural gas and the price which these consumers will have to pay for such gas?

3. Is it in the public interest for Respondent to authorize increasing imports of natural gas to absorb the market

² 15 U.S.C.A., Section 717b.

otherwise served by domestically produced oil and gas and thus deprive the United States producer of the needed funds to explore for and develop much needed new petroleum reserves?

With respect to question number 1, concerning the matter of dependence on foreign gas, this record discloses that with approval of the import application sought herein the Pacific Gas and Electric's gas supply from Canadian sources for use in the San Francisco area, will in 1968 amount to approximately 30 percent. (R-2392)

Respondent has recognized in a previous case that becoming overly dependent upon foreign sources for a natural gas supply is a real problem that must be dealt with. In Northwest Natural Gas Company,³ Respondent in referring to the granting of a gas import application under Section 3 of the Act, stated that:

"... the Commission must not fail to give the fullest possible protection to all prospective consumers."

In that case, Respondent further stated:

"Such protection would not be afforded to any segment of the American people if its sole source of essential natural gas were through importation from a foreign country without some intergovernmental agreement assuring the continued adequacy of its supply. Otherwise, all control over the production, allocation, and transportation to our border of such natural gas would be in the hands of agencies of foreign governments, whose primary interest would of necessity always be in the needs and advantages of their own people, and whose judgments and actions would be essentially dependent upon public opinion within that country, rather than upon the interests of American consumers. Regardless of any long and cherished friendly relations with any neighbor nation able to supply such area with natural gas, it would not be in the public interest to

³ 13 FPC 221, 235 (1954).

permit the importation of its gas as the sole source for the consumers in need of an uninterrupted supply at a reasonable price, which should always be assured by this Commisison to the full extent of its powers."

It is true that in the "Northwest" case the Commission referred to "sole" source of supply. However, it is submitted that having a 30 percent dependency is treading on very thin ice. If Pacific Gas and Electric were to lose 30 percent of its natural gas supply for any reasons cited by Respondent in the Northwest case, it would be a catastrophe, especially in times of national emergency.

In considering what could happen to a supply of gas not within the jurisdiction of Respondent or other U. S. governmental agencies, it must be recognized that because of its priority responsibility to its own citizens, the Canadian Government may have to assert its jurisdiction over its natural gas industry and interrupt or reduce the export of gas to the United States or impose other pricing or intolerable conditions on such exports.

In this regard, this Honorable Court is requested to take Judicial notice of a "Notice of Certification and Order to Show Cause," issued on September 13, 1966, by the Presiding Examiner in the "Great Lakes Gas Transmission Company, et al.," now pending before Respondent.

In that Order, the Examiner stated in part:

"On August 29, 1966, according to various newspaper reports, the Canadian government, by action of its Privy Council dated August 25, 1966, rejected the recommendation of its National Energy Board and indicated its refusal to approve construction of the proposed projects through the United States, stating in pertinent part:

'The Government does not believe it to be in Canada's best interest that the future development of facilities for bringing western Canadian gas to its eastern Canadian markets should be located outside Cana-

dian jurisdiction, and subject to detailed regulation under laws of the United States which are naturally designed to protect interests of United States citizens.'

"In these circumstances, it appears that any further proceedings herein are moot and that the pending applications, all of which require export authorization from the Canadian government, should be dismissed without prejudice."

It is submitted that herein Respondent failed to recognize that becoming too dependent (30 percent of supply) on Canada for a long-term is not in the public interest.

We should not lose sight of the fact that imports of natural gas from Canada, once approved by Respondent, are beyond the jurisdiction of Respondent.

Further, the provisions of the Natural Gas Act, which in the case of domestic natural gas producers, assure continuation of service once commenced, are not applicable to Canadian natural gas producers.

As to question number 2, concerning jurisdiction over prices to the U. S. consumer, it is submitted that here also Respondent, once it approves an import application, is powerless to regulate the price to be charged U. S. consumers for Canadian gas.

The record herein discloses that most of the contracts supporting the gas supply herein involved are open-ended containing indefinite pricing clauses etc. and there is no way of telling what price increases will be thrust upon the U. S. consumers herein concerned. (R-1346)

Rightly or wrongly, Respondent has outlawed such indefinite pricing provisions with respect to U. S. producers of natural gas. Yet Respondent has approved imports of natural gas supported by contracts containing open-ended indefinite pricing provisions. It is submitted that this is patently unfair and not in the public interest.

With respect to question number 3 concerning the supplanting by natural gas imports of domestic oil and gas production, it must be recognized that income thus denied U. S. producers depresses the search for and development of vitally needed new petroleum reserves for future use.

As to this, Witness Jordan testified that if natural gas imports were permitted to increase disproportionately in relation to the growth of the domestic gas producing industry, "the effect on the health and vigor of the domestic petroleum industry, both gas and oil, would be substantial and adverse." (R. 1588) He further declared that "... to the extent that imports of gas back out or reduce interstate shipments, (of natural gas) some wells that would have been drilled will not be drilled."

Witness Jordan was asked if there was any relationship between the oil and gas producing branches of the petroleum industry. His answer:

"Yes. The two industry activities are intimately related both physically and economically. They are in fact two segments of one industry, namely the petroleum producing industry. The two segments are inseparable. They cannot practically be separated and treated one from the other. What adversely affects one also adversely affects the other." (R. 1581)

Thus Canadian gas imports, which adversely affect one branch adversely affect both.

In this connection, this Honorable Court is requested to take Judicial notice, with respect to the condition of the oil and gas producing industry, of an official report of the Department of the Interior which was published in January 1965, entitled "An Appraisal of the Petroleum Industry of the United States." At page 17, the report states:

"Whatever the reasons that operated on the drilling policy of the industry, total wells drilled have gone from 58,200 in 1956 to 43,600 in 1963, a reduction of 25 percent. Concurrently, expenditures for drilling and

equipping wells fell from \$3,067 million to \$2,577 million, a decline of about 15 percent. While the greatest caution should be used to avoid any direct cause-and-effect relationship between drilling effort and contemporary additions to proved reserves there is, nevertheless, some significance in the fact that such additions to proved reserves of crude oil as computed by the American Petroleum Institute declined from a 5-year average of 3.2 billion barrels per year in the early 1950's to 2.6 billion barrels for the period 1958-63. The reserves added by new discoveries (as opposed to revisions and extensions) meanwhile declined from a five-year average of 585 million barrels per year to 340 million.

"The effect of these declines has been to slow the growth of proved reserves of crude oil almost to a halt. Between 1950 and 1956 total year-end reserves increased by 5 billion barrels. In the succeeding six-year period (1956-1962) reserves increased by less than one billion, and in four out of the past seven years additions to reserves have been less than withdrawals for use. However, additions to reserves of natural gas liquids and condensate were greater than annual production and thus helped cushion the decline in the ratio of proved reserves of total liquid hydrocarbons to production. This is no cause for immediate alarm, but it does indicate that what has been done since 1956 to find new supplies of oil, whether through new discoveries or through increasing recovery rates of old deposits, has not been enough to provide a sound basis for future growth. Additional exploration effort is needed, particularly in new field wildcat drilling. Capacity remains excessive, however, and there is no need for its expansion."

This Department of the Interior report further states at page 19:

"The constantly rising demand for natural gas forecast through 1980 raises the question of adequacy of gas reserves to meet this demand."

The report then proceeds to tabulate the natural gas reserve position during the past 17 years, listing new gas

reserves found aggregating 284 trillion cubic feet during this period. The required volume of natural gas reserves to be found during the next 17 years (1964-80) according to the report would total 584 trillion cubic feet, or more than double the volumes found in the preceding similar time period, in order to maintain the reserve to production ratio of 20:1.

The report then states as follows:

“The Geological Survey has estimated that with the additional 2 billion feet of total exploratory drilling mentioned earlier in this report, 4,000 trillion cubic feet of natural gas also will be discovered; of this total, 80% or 3,200 trillion cubic feet will be economically recoverable. Thus, it appears that domestic natural gas resources will be adequate to meet requirements during the 1964-80 period; *providing that the necessary amount of exploratory effort is forthcoming.*” (Emphasis added)

This official study by the Department of the Interior shows: (1) there is a great need for increased domestic exploration for and development of both oil and natural gas reserves, and (2) adequate domestic resources can be made available if the necessary funds and incentives are provided. It confirms the evidence of record, referred to above, which shows that the additional imports authorized by Respondent will have a depressant effect upon domestic exploration for and development of both oil and gas and, therefore, would be inconsistent with the public interest.

II. Respondent Erred in Not Recognizing That an Alternate Fuel Supply Is Available for Use By PG&E

The record in these cases shows (R. 1580) that PG&E steam plants that use natural gas are all equipped to use residual fuel oil. This record also shows (R. 1580) that there is an over-supply of residual fuel oil readily available in California. In fact, in 1964, 42,000 barrels of fuel per day were exported overseas from California; and an

additional 19,000 barrels per day were shipped to the U. S. East Coast from California.

This 61,000 barrels of residual fuel oil per day is equal on a Btu equivalent to about 370,000 Mcf of gas per day, which is more than enough to meet the 200,000 Mcf of natural gas imports per day which was authorized by Respondent in this application.

Thus the record shows that PG&E can use residual fuel under its boilers, and that residual fuel is readily available. Consideration of the availability of alternate fuels is an indispensable element in the proper measuring and determination of the "public interest." Yet Respondent chose to ignore this fact and in so doing committed error.

It is thus urged that in considering the basic issues in this review, this Honorable Court recognize that, aside from the availability of adequate natural gas from domestic sources, there is adequate residual fuel oil available at economic prices for use by PG&E.

Thus Respondent did not act in the public interest in approving the applications herein for large additional volumes of natural gas from Canada.

III. Respondent Erred in Not Adopting a Policy Whereby Canadian Natural Gas Imports Would Grow at the Same Rate as the Growth Rate of Domestic Production of Natural Gas

As set forth earlier herein, IPAA does not oppose outright natural gas imports from Canada.

IPAA's recommended policy approach to Respondent was that it adopt a reasonable solution concerning natural gas imports as outlined in the record herein by Witness Jordan as follows:

"The IPAA has been concerned about the matter of the impact of natural gas imports for many years and has given it continuing and close study since 1960 and a policy covering this subject was adopted in May 1965

which in essence is that imports should be permitted to increase but at a rate no greater than the growth rate of domestic production of natural gas.

“Q. Under this policy, what growth in imports of natural gas would be permitted?

“A. U. S. production of natural gas has increased about 5 percent for each of the last five years. Using a similar growth factor for natural gas imports would permit imports to grow about 60,000 Mcf per day per year.” (R. 1587)

In failing to adopt such a policy recommendation, it is submitted that Respondent did not act in the public interest.

CONCLUSION

Respondent in its Opinion 495 hereunder review erred in many other respects which IPAA has not touched upon in order not to duplicate the arguments presented to the Court by the petitioners herein.

For the reasons developed in this Brief as Amicus Curiae, IPAA respectfully requests this Honorable Court to declare Respondent's Opinion 495 to be unreasonable, arbitrary and illegal, and that its order be permanently stayed.

Respectfully submitted,

INDEPENDENT PETROLEUM
ASSOCIATION OF AMERICA

L. DAN JONES,
General Counsel

By /s/ WILLIAM I. POWELL
William I. Powell,
Assistant General Counsel
1110 Ring Building
Washington, D. C. 20036

Dated at
Washington, D.C.
December 12, 1966

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 21310, 21313, 21314

CALIFORNIA GAS PRODUCERS ASSOCIATION, INDEPENDENT OIL
AND GAS PRODUCERS OF CALIFORNIA, JADE OIL AND GAS
COMPANY, STATE OF TEXAS, TEXAS INDEPENDENT PRO-
DUCERS AND ROYALTY OWNERS ASSOCIATION, WEST CEN-
TRAL TEXAS OIL AND GAS ASSOCIATION AND PERMIAN
BASIN PETROLEUM ASSOCIATION, Petitioners,

v.

FEDERAL POWER COMMISSION, Respondent.

BRIEF AMICUS CURIAE
OF
INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA

CERTIFICATE

I certify that, in connection with the preparation of this brief, I
have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth
Circuit, and that, in my opinion, the foregoing brief is in full compliance with
those rules.

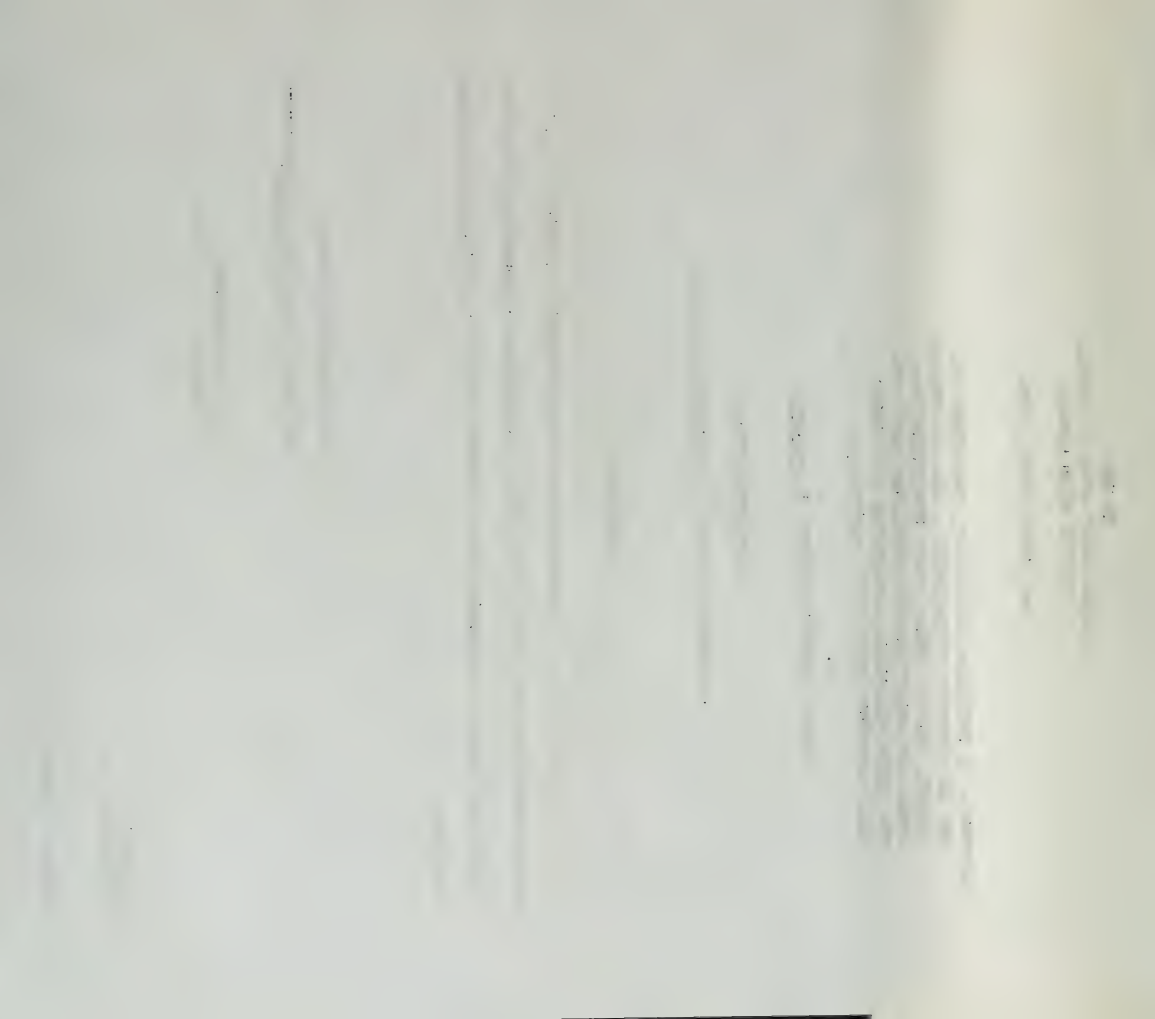
/s/ WILLIAM I. POWELL

WILLIAM I. POWELL, Attorney

1110 Ring Building
Washington, D. C. 20036

Dated at
Washington, D. C.

December 9, 1966



CERTIFICATE OF SERVICE

Pursuant to the Rules of the United States Court of Appeals for the

Ninth Circuit, I hereby certify that I have this date served the foregoing Brief Amicus Curiae upon the following Petitioners, Respondent, and the other parties admitted to participate in the proceedings below before the Commission.

Petitioners

State of Texas
(Case No. 21313)

Attorney(s) Served

Waggoner Carr, Attorney General
C. Daniel Jones, Jr., Asst. Atty. Gen.
Linward Shivers, Asst. Atty. Gen.
Box "R", Capitol Station
Austin, Texas 78711

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(Case No. 21310)

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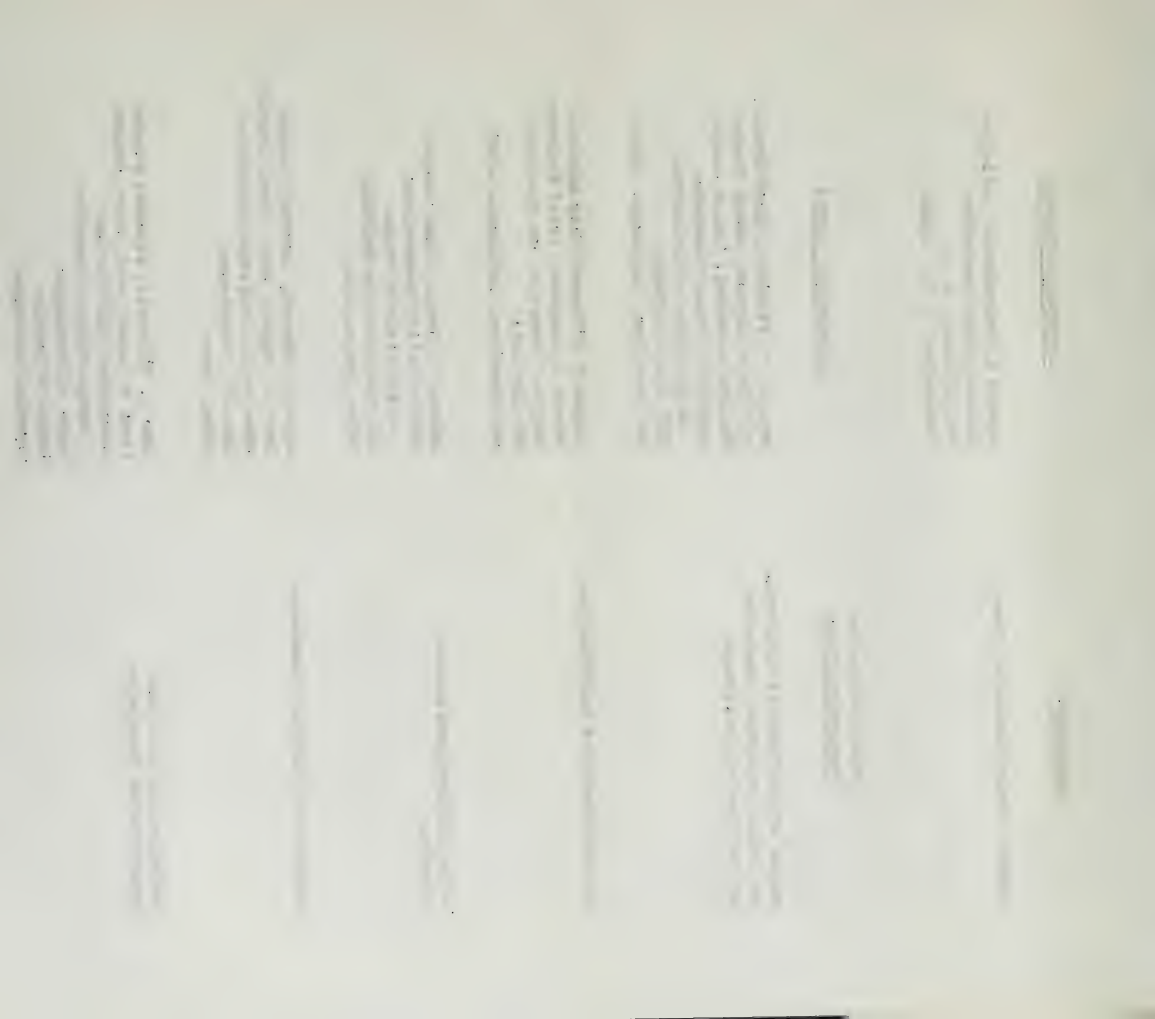
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Dated at Washington, D. C., this ninth day of December,
1966.

/s/ WILLIAM I. POWELL

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OF AMERICA

United States
COURT OF APPEALS
for the Ninth Circuit

CALIFORNIA GAS PRODUCERS ASSOCIATION et al,)	
	Petitioners,)
v.)	
	)	No. 21310
FEDERAL POWER COMMISSION, et al,)	
	Respondents.)
THE STATE OF TEXAS,)	
	Petitioner,)
v.)	
	)	No. 21313
FEDERAL POWER COMMISSION et al,)	
	Respondent.)
TEXAS INDEPENDENT PRODUCERS & ROYALTY)	
OWNERS ASSOCIATION et al,)	
	Petitioners,)
v.)	
	)	No. 21314
FEDERAL POWER COMMISSION et al,)	
	Respondent.)

On Petitions for Judicial Review
of Federal Power Commission Opinion
No. 495 and Related Orders

BRIEF OF
PUBLIC UTILITIES COMMISSIONER OF OREGON

FILED

JAN 30 1967

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	Petitioners,)
v.)	
FEDERAL POWER COMMISSION et al,)	No. 21314
	Respondent.)

On Petitions for Judicial Review
of Federal Power Commission Opinion
No. 495 and Related Orders

BRIEF OF
PUBLIC UTILITIES COMMISSIONER OF OREGON

I

STATEMENT OF JURISDICTION

These cases are appeals requesting judicial review under Section 19b of The Natural Gas Act, of

Opinion No. 495 and related orders of the Federal Power Commission, Docket Nos. CP65-213, 214 and 215. This brief is submitted pursuant to Rules of the United States Court of Appeals for the Ninth Circuit and its orders of December 7, 1966 permitting intervention in each case by the Public Utility Commissioner of Oregon.

II

INTEREST OF THE STATE OF OREGON

Pacific Gas Transmission Company (PGT), an intervenor herein, has applied to the Federal Power Commission for authority to import 200 million cubic feet (200 MMcf) of Canadian natural gas per day from Kingsgate on the United States-Canadian border in British Columbia. The gas will be transported by PGT's existing 36 inch pipeline through northern Idaho, eastern Washington and eastern Oregon to a point near the Oregon-California border where it will be delivered to Pacific Gas & Electric Company for distribution in northern California. PGT is presently transporting approximately 415 million cubic feet of natural gas per day (415 MMcf/d) to California for Pacific Gas & Electric Company. None of the additional 200 MMcf/d is to be sold within the State of Oregon.

However, Oregon comprises part of the Northwest Division of the El Paso Natural Gas Company (El Paso), an interstate natural gas pipeline company. The area served by the Northwest Division

includes the states of Oregon, Washington and Idaho and El Paso is the exclusive supplier of natural gas to the distributors in these states. The PGT pipeline from Kingsgate, British Columbia, Canada, to the Oregon-California border presently transports approximately 150 million cubic feet of gas per day (150 MMcf/d) for El Paso. The gas is delivered to PGT at Kingsgate and is put into the El Paso system at various points in Oregon, Washington and Idaho, primarily at a point near Spokane, Washington. The charges to El Paso for gas transported for it by PGT are based upon cost of service. In the event the action of the Federal Power Commission approving this project is upheld by this Court, the ratio between usage of facilities for El Paso and for Pacific Gas Transmission Company will change. The result of that changed relationship will be a reduction in the transportation charges to El Paso which will ultimately inure to the benefit of consumers in Oregon as well as in Washington and Idaho. Both Washington and Idaho supported this project before the Federal Power Commission.

III

ARGUMENT

1. Benefits to Pacific Northwest Consumers are Important Factors in Determining Whether this Project is in the Public Interest

The Federal Power Commission found that the increased use of the already existing PGT pipeline

resulting from the importation of the new 200 MMcf/d by PGT would reduce the unit cost of gas supplied not only to California, but also that gas destined for consumers in Washington, Oregon and Idaho. (R:5259)

For the years 1966 through 1970, the savings to be achieved upon approval of the PGT applications appear to be as follows: (R:1341)

1966	.09¢/Mcf
1967	1.11¢/Mcf
1968	1.34¢/Mcf
1969	1.25¢/Mcf
1970	1.10¢/Mcf

These savings in annual dollar amounts will be: (R:1342)

1966	\$46,000
1967	564,000
1968	681,000
1969	639,000
1970	564,000
Five year total	\$2,494,000

From the overall public interest standpoint, the merits of this project must be judged by more than the price of gas from Canada as against the price of gas from some other source to the Pacific Gas & Electric Company load center. A direct, substantial and readily computed benefit to consumers in the Pacific Northwest results from this project. While consumers in California would have little concern for

the interests of the Northwest so far as they relate to this project, the Federal Power Commission did recognize that this benefit to Oregon, Washington and Idaho would be immediate, substantial and in the public interest.

If one were to translate these savings to the Northwest into California consumer dollars for purposes of comparing relative costs of Canadian and Texas gas in the California market giving effect to the benefit of the project to the Northwest, it might be done as follows:

Annual gas transported for El Paso is 50,896 MMcf, which is 143,334 Mcf/d. Applying a four year average cost reduction per Mcf of 1.20¢ (1966 is omitted in the average) to the daily El Paso deliveries and dividing by the additional California deliveries, authority for which is sought herein, produces a California savings equivalent of .82¢ /Mcf. In other words, if due consideration is to be given savings achieved in the Northwest in relation to the cost differential between Canadian and Texas gas delivered in California, the savings in the Northwest produced by a grant of the applications here under consideration should be deemed to reduce the cost of the Canadian gas delivered to California by an additional .82¢ /Mcf.

**2. The Federal Power Commission Committed
No Error in Refusing to Adopt a Policy
Which Would Restrict Canadian Imports
in the Interest of "National Security."**

The California market, the dependability of Canada and the relative costs of gas from Canada and gas which Texas offers are discussed at length by other parties. However, one additional point bears mention in this brief.

The Independent Petroleum Association of America (IPAA) contends in its brief as Amicus Curiae that the Federal Power Commission erred in not adopting IPAA's policy which would restrict natural gas imports into the United States by allowing them to increase at a rate no greater than the growth rate of domestic production of natural gas. (IPAA Brief, p. 10) This proposition, as presented to the Federal Power Commission through its Brief on Exceptions was justified on the basis of national security. (R:5013) The IPAA suggests that the Mandatory Oil Import Program instituted by Presidential Proclamation No. 3279 on March 10, 1959, 24 Fed. Reg. 1781-1783 (1959), created a new consideration, national security, which the Federal Power Commission cannot ignore (R: 4997-4998). It then urges that the Federal Power Commission adopt the IPAA policy of permitting imports to increase at a rate no greater than the growth rate of domestic natural gas production (R: 5013). The Federal Power Commission rejected the IPAA proposal to adopt such a blanket pol-

icy, asserted that the Mandatory Oil Import Program did not apply to natural gas importations and further stated that under the circumstances of the instant case the factors which gave rise to the Mandatory Oil Import Program did not prevent the authorizations sought by Pacific Gas Transmission Company herein (R: 5260). In its opinion it referred to its prior consideration and rejection of the same proposal by IPAA. *Montana Power Company*, Docket Nos. G-17370 and G-17371, Opinion No. 406, issued February 8, 1966. (Appendix pp. 1-14)

The Mandatory Oil Import Program, as amended, was the culmination of Congressional direction that the Office of Civil and Defense Mobilization (OCDM), upon request or application of an interested party, or upon its own motion, conduct investigations to determine the effects upon national security of imports of the particular article which was the subject of the request, application or motion. 72 Stat. 678 (1958). If the OCDM believed the article was being imported in such quantities that the national security was threatened, by the terms of the statute it reported the results of its investigation to the President who was then authorized by Congress to take such action as he deemed necessary to adjust the imports of such article and its derivatives so that the imports would not so threaten to impair the national security. The flexibility achieved by Congress in placing this power in the President to impose import restrictions is apparent. 105 Cong. Rec. 3769-3772 (1959). In deter-

mining whether national security is threatened by importation of a particular article, the President shall consider the effect of the imports upon domestic production. 72 Stat. 679 (1958).

This forum, adopted by Congress to investigate, analyze and quickly react to importations of various articles in quantities which might threaten national security, is still open. The requests or applications of interested parties for investigations are now to be directed to the Office of Emergency Planning. 19 U.S.C. § 1862 (See Appendix). Neither Congress nor the President to whom this function has been entrusted by Congress has determined that in the interest of national security, imports of natural gas from Canada should be restricted.

The Federal Power Commission is obligated by Section 3 of the Natural Gas Act, 15 U.S.C. § 717b, (Appendix p. 14) to issue an order authorizing exportation or importation of natural gas unless it finds that the proposed exportation or importation will not be consistent with the public interest. It has made the determination that the importation under the present project is in the public interest. It may be said that if the Federal Power Commission undertook to adopt a policy of restricting natural gas imports on the grounds that a threat to national security existed where no such threat had been recognized and proclaimed by the President, it would be both presumptuous and a usurpation of an authority given expressly to the President by Congress. Further, it is

submitted that on the basis of comparative qualifications this particular issue of national security should be determined by the President and Congress, rather than by the Federal Power Commission.¹

IV

CONCLUSION

The Federal Power Commission has found that a lower unit cost of natural gas to the consumers in the Pacific Northwest States of Oregon, Washington and Idaho is part of the overall public interest.

The Federal Power Commission has also determined that no blanket restrictions should be placed upon importation of natural gas.

The Public Utility Commissioner of Oregon respectfully urges this Honorable Court to declare that the findings of the Federal Power Commissioner herein are supported by substantial evidence and that the conclusions of the Federal Power Commission,

¹ It is interesting to note that the original restrictions of the Mandatory Oil Import Program with respect to imports from Canada, and particularly imports into District V, were effectively removed by a finding by the President that it was not necessary, in order to prevent imports of crude oil, unfinished oils and finished products from threatening national security, to restrict importation of such commodities which are transported overland, by pipeline or otherwise, from the country in which they are produced to the United States. Presidential Proclamation No. 3290, 24 Fed. Reg. 3527-3529 (1959). The further amendment to Proclamation No. 3279, by Proclamation No. 3509 of November 30, 1962 did not substantially affect the lifting of restrictions on Canadian oil imports. 27 Fed. Reg. 11985 (1962).

including those set forth above, have a rational basis in law.

Respectfully submitted,

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APPENDIX

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: David S. Black, Acting Chairman;
L. J. O'Connor, Jr.,
Charles R. Ross, and Carl
E. Bagge.

The Montana Power Company)
Docket Nos. G-17370, G-17371

Opinion No. 486

**Opinion and Order Adopting Initial
Decision of Presiding Examiner**

(Issued February 8, 1966)

BAGGE, Commissioner:

This proceeding involves two applications filed on January 25, 1965, by The Montana Power Company (Montana Power) requesting first, in Docket No. G-17371, an order under Section 3 of the Natural Gas Act for authorization to import natural gas at an average daily rate of 20,000 Mcf (in addition to its presently authorized imports at an average daily rate of 30,000 Mcf) from Alberta, Canada, into the State of Montana; and second, in Docket No. G-17370, an amendment to its Presidential Permit under Executive Order No. 10485, making possible the importation of the increased quantities of gas.

Appendix 2

The Independent Petroleum Association of America (IPAA or Intervener) participated in this proceeding pursuant to Commission order issued May 14, 1965. IPAA opposed the applications, alleging that the requested imports would have the effect of foreclosing substantial markets to domestic gas or oil supplies, and therefore would be in conflict with the purpose of the Mandatory Oil Import Program.¹

By stipulation of the parties, the case was submitted on the basis of prepared written testimony and briefs without cross-examination of the witnesses for Montana Power. On October 18, 1965, Presiding Examiner Ewing G. Simpson issued an initial decision in which he ordered that authorization be granted to Montana Power to import from Canada the proposed additional volumes of natural gas. He found that Montana Power had established a need for this importation, and that such importation would not be inconsistent with the public interest. The examiner also found that the existing Presidential Permit sufficiently provided for the additional proposed imports and that no amendment or additional permit was required.

¹ The Mandatory Oil Import Program was established by Presidential Proclamation No. 3279, dated March 10, 1959, after the Director of the Office of Civil and Defense Mobilization advised the President that imports of crude oil and its products and derivatives were threatening to impair the national security. The policy of the Mandatory Oil Import Program was to limit petroleum imports into the United States from foreign countries. In issuing the Proclamation, President Eisenhower stated: "The new program is designed to insure a stable, healthy industry in the United States capable of exploring for and developing new hemisphere reserves to replace those being depleted."

The proceeding is before the Commission on the examiner's decision, exceptions filed by IPAA, and answers to these exceptions. The basic issue presented is whether Montana Power's application for an order under Section 3 of the Natural Gas Act for the importation of gas from Canada should be denied.

IPAA has filed a motion for oral argument and has asked that this argument be heard together with oral argument in the *Pacific Gas Transmission Company* proceedings, Docket Nos. CP65-213, *et al.*, asserting that these two proceedings involve similar issues. The issues in this proceeding have been adequately covered in the briefs and exceptions. Oral argument would contribute little which has not already been presented. The motion for oral argument will accordingly be denied.

Background

Montana Power, a corporation organized under State of Montana law, is engaged in the production, transmission and distribution of natural gas wholly within that state. Montana Power furnishes gas to the Cities of Butte, Anaconda, and Bozeman, as well as to areas in southwestern and south-central Montana. The system directly serves 74,300 retail users and furnishes gas to three other utilities which serve an additional 20,600 users.

Montana Power entered the gas business in 1931, at which time it secured its entire gas supply from

Appendix 4

fields in Montana. Late in the 1940's the applicant's searches for additional gas supplies in Montana and adjacent areas proved fruitless, and Montana Power then turned to Alberta, Canada, as the closest and most economic source of supply. With Commission authorization,² Montana Power began to import Canadian gas in 1952. The Commission granted the applicant additional authorizations for such imports in 1955³ and in 1960⁴ upon the applicant's showing of the decline of its domestic reserves and its inability to discover new domestic supplies within feasible transmission distance.

In this proceeding Montana Power seeks to amend the Commission's 1960 order so as to increase the amount of gas to be imported by an average of 10,000 Mcf per day commencing November 1, 1966, and by an additional average of 10,000 Mcf commencing on or about November 1, 1967, but not to exceed, along with related imports presently authorized, 60,000 Mcf in any one day.

The gas will be purchased in Canada from Alberta producers by Alberta and Southern Gas Com-

² *The Montana Power Company*, Docket Nos. G-1712, *et al.*, 1952, 11 FPC 1.

³ *The Montana Power Company*, Docket Nos. G-2805, *et al.*, 1955, 14 FPC 227.

⁴ *Pacific Gas Transmission Co. et al.*, Docket Nos. G-17350, *et al.*, 1960, 24 FPC 134. In this order the Commission authorized Montana Power to import an average quantity of 30,000 Mcf of gas per day, to a maximum of 36,000 Mcf per day and 10,950,00 Mcf per year, from western Alberta, and granted Montana Power a permit to construct, operate, maintain and connect facilities for this importation near Babb, Montana.

pany Ltd. (Alberta and Southern). It will be delivered by the latter to The Alberta Gas Trunkline Company Ltd. (Trunk Line) for transportation to a point four miles north of the Montana-Alberta border. There the gas will be sold and delivered to Canadian-Montana Pipe Line Company (Canadian-Montana), a subsidiary of Montana Power engaged in the transportation of gas in Canada. The facilities now owned and used by Canadian-Montana and Montana Power in the importation of 30,000 Mcf per day will be used for the proposed imports, without additions. Montana Power has estimated that its cost for the proposed imports for the year 1968 will be 22.09 cents per Mcf (14.73 psia) delivered at the border.

In support of its application, Montana Power submitted estimates showing that its system total loads will increase from an actual 45,041,000 Mcf in 1964 to an estimated 55,518,000 Mcf in 1970. Montana Power calculated that its available supplies in the United States together with its contracted and proposed purchases from Alberta, including the gas which is the subject of this proceeding, will suffice to meet its needs only through 1968 and that by 1970 its requirements will exceed its supplies by an estimated 9,312,000 Mcf. The applicant further stated that it has not abandoned its exploration program for discovering domestic sources of natural gas, but that this program has not met with success, and that it must obtain gas from Canada in order to avoid the curtailment of deliveries and the denial of service to its prospective customers.

Appendix 6

Montana Power's allegations as to its needed requirements of gas and its available resources were not disputed by the other parties. The ability of Alberta and Southern to obtain the volumes of gas contracted to Montana Power was stipulated. Official Canadian approval permitting the export of the gas has been obtained.⁵

IPAA's Objections

IPAA, a national trade organization representing more than 6,000 oil and natural gas producers, did not attack or attempt to refute Montana Power's presentation as to its need for the requested imports of gas. Intervener advocated, however, that the Commission should establish a policy whereby the approval of imports of natural gas would be correlated with the oil import restrictions of the Mandatory Oil Import Program. Intervener stated that it was not trying to keep Montana Power from getting something which it needed and could not get elsewhere, but was simply attempting to inform the Commission that growing imports of crude oil and natural gas liquids were having a "dampening" effect on the domestic oil industry. The essence of Intervener's case was summarized in its Initial Brief at page 19:

⁵ Alberta and Southern has secured a permit (No. AS64-3) from the Alberta Oil and Gas Conservation Board, approved by the Lieutenant Governor in Council (O.C. 1941/64), authorizing the removal of the gas involved during the term ending October 31, 1989. Montana Power has also filed a certified copy of the license issued to Canadian-Montana by the National Energy Board of Canada (No. GL-17), approved by order in Council (P.C. 1486), authorizing the exportation.

“Standing alone the additional volumes of foreign natural gas sought by applicant may not be sufficient to thwart or endanger this Nation’s policy to limit imports in the interest of our national security. However, when added to that already being imported, other import applications now pending and still others certain to come, it can easily be seen that such increasing imports will pose a serious threat to the domestic petroleum producing industry and thus to our Nation’s security.”

Montana Power attacked Intervener’s objections, stating that these were founded upon the fallacies of assuming that the problems of the oil and natural gas industries were identical and that the imported gas would supplant domestic production. Montana Power asserted that the policies of the Mandatory Oil Import Program are not applicable to the natural gas industry and pointed out that no domestic gas supplies would be supplanted by the imports, since its own discovery efforts in the areas near Montana had proved fruitless. Staff corroborated this statement as to the absence of an economic domestic source of gas and added that it might not be in the national security interest to foreclose needed imports of gas, forcing the consumption of domestic reserves at the fastest possible rate at the highest possible price.

The Examiner’s Initial Decision

The examiner proposed in his initial decision that authorization be granted to Montana Power to enable it to import its requested volumes of gas. The ex-

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aminer found that these imports would not be inconsistent with the public interest, and he found no support of record fact for Intervener's contention that this authorization would be contrary to the national policy.

With respect to Intervener's argument that imports of gas serve to supplant domestic petroleum products, the examiner concluded that this argument was essentially the displacement-of-fuels objection raised by coal, oil and related interests in earlier proceedings before the Commission. He pointed out that it had been generally held that the interests of competing fuels would be considered along with those of all others,⁶ but that the authorization for gas would be granted where it appeared that preponderant advantages would attend its use, or that an overbalancing public benefit would result.⁷ The examiner found that, measured by these standards, Montana Power's proposal merited approval, particularly in view of the applicant's inability to solve in any other way its problem of dwindling reserves.

IPAA's Exceptions To The Examiner's Initial Decision

IPAA's exceptions to the examiner's decision recite seven alleged errors, all relating to the examiner's

⁶ *American Louisiana Pipe Line Co., et al.* (G-2306, *et al.*, 1958), 20 FPC 575, 608, 609.

⁷ *Southern Natural Gas Co.* (G-14740, 1962), 28 FPC 283; *Coastal Transmission Corp., et al.* (G-18338, *et al.*, 1961), 26 FPC 318, 325.

refusal to find that the denial of Montana Power's application was required by operation of the Mandatory Oil Import Program. Intervener contended that the examiner erred (1) in not going beyond the Natural Gas Act and in not taking cognizance of the Mandatory Oil Import Program; (2) in not taking judicial notice of such Import Program; (3) in failing to consider national security problems arising from U.S. consumer dependency on foreign supplies; (4) in finding that the proposed imports would not adversely affect the incentive to explore for and develop domestic reserves; (5) in finding that the proposed import would not endanger the national policy of limiting oil imports; (6) in not considering the national security implications of this proceeding; and (7) in not considering the long-term interest of the applicant's customers.

We find that Intervener's exceptions are not persuasive and, indeed, are not factually accurate. As to exceptions (1) and (2), the examiner's decision shows that he took full cognizance and judicial notice of the Mandatory Import Program in arriving at his findings.⁸ Furthermore, contrary to exceptions (3), (5), (6), and (7), he gave adequate consideration to the questions of national security and long-term consumer interest. And finally, with respect to

⁸ The examiner pointed out (pp. 9-11 of mimeographed decision) that during the period when the oil import program was being formulated, natural gas received infrequent mention, and only in general terms, with no indication that natural gas had any association, potential or otherwise, with the matters under consideration.

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exception 4, the examiner had ample basis for finding that the applicant's proposed imports would not adversely affect the incentive to explore for and develop domestic reserves.⁹

Section 3 of the Natural Gas Act provides that the Commission shall, upon application, issue an order for importing natural gas from a foreign country, unless, after opportunity for hearing, it finds that the proposed importation will not be consistent with the public interest. In this proceeding Montana Power has made a convincing *prima facie* showing of its need for the requested imports, of its inability to discover new accessible domestic gas fields, and of the practicability of piping the Alberta gas into Montana. Intervener has not refuted Montana Power's showing of need, nor has it been able to demonstrate that domestic sources of gas are readily available to supplement Montana Power's dwindling reserves. The urgency of the applicant's position assumes particular significance in light of the fact that part of the gas to be imported will be used to replace gas which was formerly purchased from Montana-Dakota Utilities, but which is no longer available,¹⁰ and also in

⁹ The examiner noted (pp. 12-13) that natural gas imported from Canada is currently averaging some 2.48 percent of domestic market production, and is transmitted to twelve states by pipe lines, after various approvals by the Commission based upon a demonstrated public need. He observed (p. 11) that consideration of the matters mentioned in the FPC Annual Reports to Congress did not give any indication that imports of gas confronted domestic oil and gas exploration and development programs with an emergency.

¹⁰ The Commission authorized Montana-Dakota to abandon its sales to Montana Power effective January 1, 1965, by Order issued November 4, 1964, in Docket No. CP65-36.

light of the fact that Montana Power's industrial customers include mining and metal processing interests of importance to the national security.

Intervener's objections do not warrant the denial of Montana Power's application. Indeed, IPAA conceded that the volume of imports involved in this proceeding is *de minimis* and that Montana Power's proposed imports "standing alone" afford little basis for Intervener's expressions of alarm as to the national security or the health of the domestic petroleum industry. To the extent that Intervener's case is based upon its assumption that the denial of Montana Power's application will compel the search for and discovery of new domestic gas and oil wells, Intervener has not established its case.

Intervener asserted that the Commission is acting without administrative standards or appropriate policy guidelines in ruling upon applications for the importation of Canadian natural gas. We find that this argument is without merit. The Commission's standards and guidelines in proceedings of this type have been enunciated repeatedly in *Northwest Natural Gas Company, et al.*, 13 FPC 221, 235 (1954); in *American Louisiana Pipe Line Company, et al.*, G-2306, *et al.*, 20 FPC 575, 591 (1958); and in *Pacific Gas Transmission Company, et al.*, G-17350, *et al.*, 24 FPC 134, 135 (1960). The Commission's concern for the protection of the consuming public, the adequacy of the available supply of gas, and the effect of the importation of gas upon national security and national

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welfare has been plainly expressed in the above decisions. We have applied these standards and guidelines to the facts of this case, and we affirmatively find that they are here satisfied.

We accordingly approve and adopt the examiner's findings and conclusions with respect to Montana Power's application, to the extent not inconsistent with the foregoing discussion.

The Commission further finds:

(1) The Montana Power Company is a "person" within the meaning of Section 2(1) and Section 3 of the Natural Gas Act.

(2) The Montana Power Company owns and operates a natural gas production gathering, transmission and distribution system in the State of Montana for the sale of natural gas for ultimate public consumption within that State; its rates for natural gas service are regulated by the Public Service Commission of Montana; and the gas which it proposes to receive from Canadian-Montana Pipe Line Company at the international border will be used solely in Montana.

(3) The importation of natural gas herein proposed by The Montana Power Company should be authorized subject to the conditions stated in ordering paragraphs below.

(4) The Presidential Permit issued to The Montana Power Company on September 19, 1960, in Docket No. G-17370, which is presently used by The Mon-

tana Power Company to import 30,000 Mcf per day of natural gas as authorized in Docket No. G-17371, from Canada into the United States, sufficiently provides for the additional imports proposed, and no amendment or additional Permit is required.

(5) The exceptions to the examiner's decision should be denied.

The Commission orders:

(A) The Montana Power Company is authorized, subject to the conditions specified herein, to import from Canada into the United States additional gas to an average of 10,000 Mcf per day commencing on or about November 1, 1966, and to an average of 20,000 Mcf per day commencing on or about November 1, 1967, at a point of interconnection on the International Boundary, all as more fully described in the application filed herein in Docket No. G-17371 and the evidence received in these proceedings.

(B) The authorization granted is subject to the applicable terms and conditions of the Commission's Order issued to The Montana Power Company in Docket No. G-17371, August 5, 1960 (24 FPC 134).

(C) The examiner's decision, to the extent not inconsistent herewith, is adopted as part of this Opinion and Order.

(D) The exceptions to the examiner's decision are denied.

(E) The motion for opportunity to present oral

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argument before the Commission is denied.

By the Commission.

(SEAL)

Gordon M. Grant,
Acting Secretary

NATURAL GAS ACT, SEC. 3, 15 USCA §717b

Exportation or importation of natural gas

After six months from June 21, 1938 no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises it may find necessary or appropriate. June 21, 1938, c. 556, § 3, 52 Stat. 822.

**TRADE AGREEMENTS EXTENSION ACT OF 1962,
19 USCA §1862**

Safeguarding national security—Prohibition on decrease or elimination of duties or other import restrictions if such reduction or elimination would threaten to impair national security.

(a) No action shall be taken pursuant to section 1821(a) of this title or pursuant to section 1351 of this title to decrease or eliminate the duty or other import restriction on any article if the President determines that such reduction or elimination would threaten to impair the national security.

(b) Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Director of the Office of Emergency Planning (hereinafter in this section referred to as the "Director") shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from other appropriate departments and agencies, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. If, as a result of such investigation, the Director is of the opinion that the said article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall promptly so advise the President, and, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances

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as to threaten to impair the national security as set forth in this section, he shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security.

(c) For the purposes of this section, the Director and the President shall, in the light of the requirements of national security and without excluding other relevant factors, give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements. In the administration of this section, the Director and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displace-

ment of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

(d) A report shall be made and published upon the disposition of each request, application, or motion under subsection (b) of this section. The Director shall publish procedural regulations to give effect to the authority conferred on him by subsection (b) of this section. Pub. L. 87-794, Title II, § 232, Oct. 11, 1962, 76 Stat. 877.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Richard W. Sabin

RICHARD W. SABIN

Attorney

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing upon:

Federal Power Commission
Howard E. Wahrenbrock, Solicitor
441 G Street N.W.
Washington, D. C. 20426

and all other parties to this proceeding.

/s/ Richard W. Sabin

RICHARD W. SABIN

January 27, 1967

Nos. 21,310, 21,313 and 21,314

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CALIFORNIA GAS PRODUCERS ASSOCIATION,
INDEPENDENT OIL AND GAS PRODUCERS OF
CALIFORNIA, JADE OIL AND GAS COMPANY,
STATE OF TEXAS, TEXAS INDEPENDENT
PRODUCERS AND ROYALTY OWNERS ASSO-
CIATION, WEST CENTRAL TEXAS OIL AND
GAS ASSOCIATION and PERMIAN BASIN
PETROLEUM ASSOCIATION,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

**BRIEF OF INTERVENOR
CITY AND COUNTY OF SAN FRANCISCO**

THOMAS M. O'CONNOR,

City Attorney of the City and County of San Francisco,

WILLIAM F. BOURNE,

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Chief Valuation and Rate Engineer

of the City and County of San Francisco.

FILED

JAN 30 1967

WM. B. LUCK, CLERK

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Nos. 21,310, 21,313, 21,314

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CALIFORNIA GAS PRODUCERS ASSOCIATION,
INDEPENDENT OIL AND GAS PRODUCERS OF
CALIFORNIA, JADE OIL AND GAS COMPANY,
STATE OF TEXAS, TEXAS INDEPENDENT
PRODUCERS AND ROYALTY OWNERS ASSO-
CIATION, WEST CENTRAL TEXAS OIL AND
GAS ASSOCIATION and PERMIAN BASIN
PETROLEUM ASSOCIATION,

Petitioners,

VS.

FEDERAL POWER COMMISSION,

Respondent.

**BRIEF OF INTERVENOR
CITY AND COUNTY OF SAN FRANCISCO**

PRELIMINARY STATEMENT AND JURISDICTION

This case involves appeals filed by the California Gas Producers Association, Independent Oil and Gas Producers of California, the Jade Oil and Gas Company, the State of Texas, Texas Independent Producers & Royalty Owners Association, West Central Texas Oil and Gas Association and the Permian Basin Petroleum Association. The Independent Pe-

troleum Association of America has filed an Amicus Curiae Brief in support of petitioners herein.

The petitioners are requesting review of three orders issued by the Federal Power Commission authorizing a subsidiary of the Pacific Gas & Electric Company (PG&E), namely, the Pacific Gas Transmission Company (PGT) to import 100 million cubic feet per day of Canadian natural gas commencing on November 1, 1966, and an additional 100 million cubic feet per day commencing on November 1, 1967 for availability to the Northern California market.

These three orders are:

1. Order denying reconsideration, Waiver of the Commissioner's Rules and Making Determination of the Question of "Extraordinary Circumstances" (issued December 17, 1965).
2. Opinion and Order Issuing Certificate and Authorizing Importation of Natural Gas (issued June 15, 1966).
3. Order Denying Application for Rehearing (issued August 4, 1966).

The appeal is filed pursuant to Section 19(b) of the Natural Gas Act (15 USC, § 717r(b)).

QUESTIONS PRESENTED

1. Whether imports of natural gas will adversely affect the production of domestic gas and is it in the public interest to import such gas?
2. Whether the Federal Power Commission correctly excluded testimony of witnesses Arlan Edgar,

Bob R. Harris and Barry Hunsaker that would have allegedly established additional or alternative supplies of gas available and deliverable more cheaply than Canadian gas to the Northern California border? That excluding the testimony was a denial of due process to exclude such testimony?

INTEREST OF THE CITY AND COUNTY OF SAN FRANCISCO

The City and County of San Francisco is the financial and commercial center of the West Coast and has a population of approximately 750,000 people.

Of prime consideration is the gas consumer in this area who must be continually protected and provided for and supplied with natural gas at reasonable rates.

The Pacific Gas & Electric Company services the City and County of San Francisco, the State of California and the Northwest and attempts to do so in the most economical manner possible. By piping in natural gas from Canada at a much lower rate than could be obtained from any other source, PG&E will insure an adequate gas supply in the future for increasing demands at low cost to the consumer.

Evidence to date shows the State of California does not have adequate gas supplies or fields to supply demands nor to handle its growth in industry.

It is also the contention of the City and County of San Francisco that the Federal Power Commission was correct in all of its rulings and there is no evidence to support the contentions and allegations of the petitioners.

**IMPORTS OF NATURAL GAS WILL NOT ADVERSELY AFFECT
THE PRODUCTION OF DOMESTIC GAS**

It has been estimated that the population in the State of California will increase from nineteen million in 1965 to twenty-two million in 1970. New industries will necessarily develop to support that population and consumer requirements will increase. PG&E must be prepared to meet these future demands.

It is necessary to forecast prospective firm requirements including maximum peak requirements and to make commitments to purchase known supplies of natural gas sufficiently in advance of such requirements to allow time for the obtaining of all required regulatory approvals and the construction of facilities to transport that gas from point of delivery to customers. (R. 1613.)

It is noted that the gas producers of California have not made any definite statement as to whether there are sufficient reserves to supply future demands of PG&E. PG&E has purchased available domestic gas and will continue to do so for its growing needs.

The history of dry gas discoveries in California has been sporadic and volumes have varied tremendously as to quantity and quality. Petitioners have not produced any evidence to offset testimony that gas reserves are being depleted nor can they insure future discovery of necessary fields of gas.

There has been no existing pattern of discoveries to guarantee a future supply for the prospective firm

requirements of PG&E and it cannot be determined if there are available gas reserves. Evidence presented reflected that an analysis of potential sources of gas failed to disclose any significant quantity of uncommitted gas.

The petitioners have not been able to offer any guarantee of any future supply of gas. The State of Texas, through witnesses, make reference to shut-in wells and other sources, but it is evident that there was no application from out of state sources before the Commission.

There also has been no offering of proof that production of domestic gas will be affected in any way. Petitioners have made only vague reference to future discoveries, adequate reserves and alternate supplies of natural gas, but there has been no substantial offer of evidence to support these contentions.

The California producers have not established the proposition that they are ready, willing and able to undertake on a firm contract basis to supply the needs of PG&E in the future. They do not have the reserves available and they do not have the deliverability. (R. 1493.)

Petitioners allege also that there is no need in Northern California for the huge volumes sought by the PGT application, but PG&E, through testimony and its Exhibit No. 18, prove that there is a large and expanding market for natural gas in the area now served by PG&E and that this market can readily and advantageously use the additional supply of gas that is the subject of the application. (R.1110.)

PG&E also proved that on an annual basis, the requirements for gas as estimated from 1965 through 1970 are such that PG&E will use substantially all the out of state gas available to it. (R. 1111.)

The Natural Gas Act (15 USC, Section 717b) authorizes the importation of natural gas only when such import is "consistent with the public interest".

The Independent Petroleum Association in their Brief Amicus Curiae allege this importation of Canadian gas for use in the *San Francisco area* will in 1968 amount to approximately 30 percent. They cite *Northwest Natural Gas Company* case (13 FPC, 235 (1954) which is not in point as that case concerned the importation of gas as the "sole source" of supply.

The petitioners have not offered any evidence that there will be a continued dependency on Canadian gas, but use a theory that Canada may have a crisis and stop the supply.

Hearings are decided on facts, not suppositions, and it should be pointed out that:

"The Natural Gas Act was passed for the benefit of the ultimate consumer." (*Cities Service Gas Company v. Federal Power Commission*, 176 F.2d 548.)

In fact natural gas has for many years been imported from Canada because of the rapid expansion and growth of the market and the competitive price situation caused by the desire to serve that market.

If Canadian gas had not been allowed to be imported, the price for the domestic supply would cer-

tainly have been higher, primarily due to the supply and demand concept of economics.

Prior to the import of Canadian gas to California, the sole supplier of out of state gas was El Paso Company which supplied about 70% of PG&E's total gas purchases.

California producers have never been able to supply the growing market of Northern California but have provided a very necessary function in supplying PG&E so that they can meet their peak day requirements.

These California producers are paid approximately the border price for natural gas coming into California which is eleven cents (11¢) per thousand cubic feet (MCF) *more* than the incremental cost of the additional Canadian gas authorized by the Federal Power Commission in this case. This means the average producer in California is receiving a well-head price for their gas of approximately thirty cents (30¢) per MCF compared to the Canadian price of eighteen cents (18¢) per MCF.

Testimony presented by PGT (Tr. 1621) establishes the cost of Canadian gas at the city gates of San Francisco as 31.4 cents, 31.7 cents and 31.8 cents per MCF for the years 1968, 1969 and 1970, respectively, adjusted to 1,000 BTU (British Thermal Unit or heating quality basis). The incremental cost on the same basis for the additional 200 million cubic feet of gas (M2 cf) is 22.8 cents, 23.4 cents and 24.1 cents per MCF for the same respective years. It was also shown that the well-head price of California produced

gas is 30 cents per MCF (1,000 BTU basis) and approximately four cents (4¢) for transmission is then added. This makes a total of thirty-four cents (34¢) per MCF or eleven cents (11¢) higher than the cost of the Canadian gas. (Tr. 1622.)

Evidence was presented to show that in the interest of the consumers in Northern California it is necessary to preserve the gas fields as long as possible in order to meet future peak periods. The life index for Northern California has dropped considerably in the last few years as evidenced by the fact that the index showed in 1962, 17.4 years, but in 1964 it dropped to 12.4 years. (Tr. 782.) This clearly indicates that with no future reserves added and the withdrawal rate remaining the same, the present supply of California gas would be exhausted in 12½ years. Therefore, it is necessary that future loads be served from known reserves existing, such as the Canadian gas.

There is no doubt that the import of natural gas would in no way affect the production of domestic gas as a required necessity and it definitely is in the public interest to import this Canadian gas.

**THE COMMISSION CORRECTLY EXCLUDED THE TESTIMONY
AND EXHIBITS OF WITNESSES AND THERE WAS NO
VIOLATION OF DUE PROCESS**

The proposed testimony of Arlan Edgar as a witness for the State of Texas was to indicate that the Delaware Basin which adjoins the Permian Basin in Texas on the west contained five productive gas fields

with proven reserves. In addition, 17 wells were being drilled and each is expected to be productive.

Mr. Edgar was also to testify that all of the gas contained in the above described fields and wells had been dedicated to an out of state market but none to the San Francisco or Northern California markets.

This proposed testimony does not support nor was it related to any application to dedicate any natural gas to an interstate market. (Tr. 137, 138.)

The Examiner was correct in excluding testimony not relevant to the instant hearing.

The State of Texas also attempted to introduce the testimony of Bob R. Harris, an employee of the Texas Railway Commission. (Tr. 135, 136.)

This testimony pertained to availability of uncommitted natural gas in the Permian Basin area of Texas and the number of shut-in wells in the State of Texas. It also does not support, nor is it related to, any application to dedicate any specific Texas gas for sale and/or transportation in interstate commerce.

Again the Examiner was correct in sustaining the motion to exclude the proposed testimony and supporting exhibits.

The State of Texas then sought the issuance of a subpoena duces tecum for the witness Barry Hunsaker, who was an employee of El Paso Natural Gas Company. (Tr. 139.) The testimony and supporting exhibits sought to be introduced related to the location, design and cost of facilities to enable El Paso Natural Gas Company an additional amount of gas in

the *Gulf Pacific* case which is not connected in any way with this case. These five pages of testimony out of approximately 30,000 pages was a minute part of a complex case and would contribute nothing.

Petitioners contend failure to bring in this evidence prevented the showing of an alternate method of supplying gas to California at a firm price and a cheaper price than the Canadian gas through the El Paso Gas Company pipeline.

Actually the offered testimony and exhibits deal only with flow diagrams and construction costs, and do *not* deal with price nor does it show the cost of delivering the gas to California.

Counsel for Texas said they have an adequate supply of gas but no means for delivering it to California so "we are going to volunteer the El Paso pipeline." (Tr. 42.)

Counsel for El Paso stated:

"El Paso has no application in this case. El Paso has no unfilled capacity by which we could make deliveries to PG&E. Therefore, we are not a competing applicant in this case; it has not been El Paso who offered any testimony. We have not filed any prepared testimony."

In addition to the above, counsel for El Paso said:

"I wish the record to reflect, in connection therewith, that on cold winter days, the requirement of El Paso's customers east of California are such that curtailment of the interruptible and portions of the firm industrial segments thereof are required and on such days El Paso

would not be able to deliver to its California customers gas over and above its firm quantities.

“As I stated previously, *on the record*, El Paso has no excess capacity by virtue of which it could make deliveries at this time to PG&E. Its system is operating virtually at capacity, in terms of the contracts which it now has.” (Tr. 1377.)

The *City of Pittsburgh v. Pacific Power Commission* case (237 F.2d 883) does indicate as set forth by petitioner that “all alternative means (to supply gas) should be considered”. But here no alternates have been shown nor would the inclusion of the proffered testimony add anything of a material nature.

“Questions arising out of another proceeding involving the natural gas company and the opponent would not be considered on review.” (*Michigan Consolidated Gas Co. v. Federal Power Commission*, 283 F.2d 204.)

“The finding of the Commission as to the facts, if supported by substantial evidence shall be conclusive.” (15 USC, § 717r(b), *Shell Oil Company v. Federal Power Commission*, 334 F.2d 1002.)

Here the petitioners have attempted to use testimony from unrelated proceedings and have not been able to rebut the highly substantial evidence that importation of Canadian gas is necessary and less costly.

The State of Texas alleges that because of the refusal of the Presiding Examiner and the Commission to allow in the testimony of Bob R. Harris and Barry Hunsaker such refusal was a denial of the State of Texas' inherent right to due process as guaranteed by

the Fifth Amendment of the United States Constitution.

“The parties to a proceeding before an administrative agency such as the Commission are entitled to:

First: Due notice as to the nature and scope of the contemplated inquiry;

Second: An opportunity to be heard and present evidence;

Third: A full hearing within conformity with the fundamental concept of fairness.

Arguing that the exclusion of the testimony was a denial of procedural due process must be examined in the light of the settled principles which govern the proceedings of administrative agencies.” (*Shell Oil Company v. Federal Power Commission*, 334 F.2d 1002.)

“A refusal of the Commission to issue a subpoena for a witness in a hearing was not prejudicial error when his testimony would not have been relevant or material to the issues.” (*Mexicana De Gas, S.A. v. Federal Power Commission*, 167 F.2d 804.)

There is no doubt that the petitioners were given every opportunity to present evidence which would be pertinent to this matter. They contend that testimony concerning probabilities and possibilities of methods of gas supply were germane to the issue, but it was correctly ruled that the proffered testimony was irrelevant and immaterial to the instant matter before the Commission. Petitioners were treated with the utmost fairness and there was no denial of due process.

CONCLUSION

The City and County of San Francisco contends that the exclusion of the proffered testimony was legal and justifiable as it was immaterial and irrelevant. Further that the rulings of the Presiding Examiner and the Commission were correct and necessary for the consumers in the area served by the PG&E.

The petitioners and the Independent Petroleum Association of America as Amicus Curiae have presented no evidence or authorities to show error or denial of due process and it is respectfully requested by the City and County of San Francisco that this appeal be denied.

Dated, San Francisco, California,
January 24, 1967.

Respectfully submitted,

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ROBERT R. LAUGHEAD,

Chief Valuation and Rate Engineer

of the City and County of San Francisco.

NOS. 21310, 21313, and 21314
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21310

CALIFORNIA GAS PRODUCERS ASSOCIATION,
INDEPENDENT OIL AND GAS PRODUCERS OF CALIFORNIA,
AND JADE OIL AND GAS COMPANY, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 21313

THE STATE OF TEXAS, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 21314

TEXAS INDEPENDENT PRODUCERS &
ROYALTY OWNERS ASSOCIATION, et al., *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

**JOINT BRIEF OF INTERVENORS
SOUTHERN CALIFORNIA GAS COMPANY,
SOUTHERN COUNTIES GAS COMPANY
OF CALIFORNIA,
AND PACIFIC LIGHTING SERVICE
AND SUPPLY COMPANY**

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Certificate of Counsel

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NOS. 21310, 21313, and 21314
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21310

CALIFORNIA GAS PRODUCERS ASSOCIATION,
INDEPENDENT OIL AND GAS PRODUCERS OF CALIFORNIA,
AND JADE OIL AND GAS COMPANY, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 21313

THE STATE OF TEXAS, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 21314

TEXAS INDEPENDENT PRODUCERS &
ROYALTY OWNERS ASSOCIATION, et al., *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

**JOINT BRIEF OF INTERVENORS
SOUTHERN CALIFORNIA GAS COMPANY,
SOUTHERN COUNTIES GAS COMPANY
OF CALIFORNIA,
AND PACIFIC LIGHTING SERVICE
AND SUPPLY COMPANY**

I.

STATEMENT OF INTEREST

Southern California Gas Company, Southern Counties Gas Company of California, and Pacific Lighting Service and Supply Company¹ (Pacific Lighting), serve natural gas in central and southern California. Their service territory is contiguous to the service territory of Pacific Gas and Electric Company (PG&E), which serves natural gas in central and northern California. PG&E receives part of its out-of-state gas supplies from Canada through a subsidiary, Pacific Gas Transmission Company (PGT). The granting of PGT's applications below to deliver additional gas to PG&E form the subject of these appeals.

Interconnections between pipeline systems of PG&E and Pacific Lighting exist in some locations in order to enable the two utility systems to render, should circumstances warrant, emergency gas service to each other. Additionally, Pacific Lighting is presently making temporary gas purchases from PG&E. Such arrangements are beneficial to the customers of both utilities and are approved by the California Public Utilities Commission. It follows that Pacific Lighting has an important interest in seeing that PG&E has adequate supplies of natural gas. Therefore, it intervened in the proceedings below in support of the PGT applications.

¹ Formerly known as Pacific Lighting Gas Supply Company.

II.

STATEMENT OF ISSUES

Although several issues have been raised by the petitioners in their opening briefs, Pacific Lighting assumes that the respondent, Federal Power Commission (Commission), and intervenor, PGT, will adequately address themselves to these issues. For us to rediscuss all the issues would be merely repetitious. However, on one issue, our knowledge of the underlying facts may be of possible aid to the Court. We are, therefore, limiting ourselves to the discussion of this issue. It is:

Did the Federal Power Commission err in rejecting the contention that Texas gas was available as a feasible alternative to the PGT project under consideration?

III.

RELEVANT FACTS

Before arguing the lack of merit in petitioners' position, it is first necessary to set the stage with the precise facts involved.

Prior to and during the hearing, the State of Texas (Texas) proposed that Texas gas was a suitable alternative supply to additional gas being sought by PGT in Canada. The other petitioners subsequently joined Texas in this argument.

In support of its position, Texas sought to introduce the testimony of Mr. Bob R. Harris (who stated, *inter alia*, that gas was being flared or wasted in the Permian Basin in contravention of the State's conservation laws) (R. 2909-10), and Mr. Barry Hunsaker, an employee of El Paso Natural Gas Company (R. 2920-33).

The latter testimony was not evidence prepared for this proceeding. Instead, it was evidence prepared by El Paso for another unrelated proceeding — the comparative hearing instituted by the Commission to resolve competitive pipeline company applications relative to supplying natural gas to the *southern California area*. (*Transwestern Pipeline Company, et al.*, Docket Nos. CP63-204, *et al.*).

The purpose of Mr. Hunsaker's testimony was to show that the alternative to the El Paso and Transwestern Pipeline Company projects, the proposed direct sale-industrial pipeline of Gulf Pacific Pipeline Company (Gulf Pacific), would parallel the existing systems of El Paso and Transwestern Pipeline Company (the pres-

ent suppliers of out-of-state gas to southern California) (R. 2920, *et seq.*), and that Texas Gulf Coast gas — Gulf Pacific's supply — has been traditionally transported to markets in the North and East and is relied on by consumers in these areas (R. 2923, *et seq.*). Additionally, the Hunsaker testimony outlined the nature and extent of some of the facilities El Paso proposed to build in the southern California supply proceeding. To put this evidence in proper context, it is necessary to note that the Hunsaker evidence offered by Texas was only *part of the evidence* submitted by El Paso in *Transwestern, supra*, on the facilities it intended to build. Earlier, El Paso in its case in chief had submitted evidence on facilities required to deliver an incremental supply of 250,000 Mcfd² of natural gas to the southern California market. Later, because there was in issue whether additional supplies over the initial 250,000 Mcfd were immediately required in southern California, El Paso filed evidence describing facilities needed to deliver an additional 325,000 Mcfd over and above the initial 250,000 Mcfd by means of facilities known as the Chaco-Needles line. Texas did not seek to introduce the testimony concerning the facilities for the initial 250,000 Mcfd nor the testimony on facilities for the Chaco-Needles line. Instead, it limited itself to only the Hunsaker testimony concerning an alternative means of delivering the additional 325,000 Mcfd to the southern California market by adding facilities to El Paso's existing system.

The cost of these particular additional facilities was stated to be \$77,810,000 over and above the cost of

² Mcfd means thousand cubic feet per day.

\$50,442,000 for the basic 250,000 Mcfd incremental supply (for a total of \$127,523,000) (R. 2932).

The Examiner excluded this evidence, but in doing so, he stated:

“Counsel for the state of Texas stated at the pre-trial the State of Texas would like to sponsor and incorporate by reference certain testimony and supporting exhibits from the record made in the transcript of the Trans-Western Pipeline Company, Docket No. CP63-204, the Gulf Pacific Case, as it is popularly known, to show that the State of Texas has an adequate supply of natural gas not now dedicated to an interstate sale, but they have no means of getting it transported to California.

“So, to quote counsel for the State of Texas, ‘We are going to volunteer El Paso Pipe Line to show the price of gas delivered at the California border. The Texas gas, according to counsel for the State of Texas, would be sold to El Paso and by it transported to California where it would be offered for sale.

“The testimony and supporting exhibits sought to be incorporated herein was given in the Gulf Pacific matter by an employee of and witness for the El Paso Natural Gas Company by the name of Barry Hunsacker [sic]. The record in Gulf Pacific has been closed and is presently under consideration by Examiner Kurtz. The testimony and supporting exhibits of the Witness Barry Hunsacker [sic] sought to be incorporated herein relate to the location, de-

sign and cost of facilities to enable El Paso to deliver an additional 325 MMcf per day of natural gas in the Gulf Pacific Case, as well as an additional 250 MMcf per day as proposed by El Paso in Docket No. CP64-76, which docket was also consolidated with the Gulf Pacific matter.

“These volumes are to be delivered if certificated to the southern California companies for distribution by them to the southern California markets, not to the San Francisco or northern California markets for which Pacific Gas Transmission and PG&E herein seek additional supplies of gas.” [R. 138-140]

He further indicated that the evidence would be before the Commission as an offer of proof and could be then reviewed by the Commission:

“And, as I have said before, if the Commission wants to look at this evidence, then you should make your offer of proof. It will then be before the Commission and perhaps by that time Gulf Pacific may also be before the Commission.

“There are no extraordinary circumstances here that the Examiner sees where a prompt decision on this question is required by the Commission or is necessary to prevent detriment to the public interest. The Examiner’s decision in this case undoubtedly will be reviewed by the Commission, perhaps by the Court, and if it is reviewed by the Commission and you make your offer of proof, as is provided by the rules of practice and procedure, then the evidence that you now seek to offer will be available to them.” [R. 816-7]

The Commission in refusing to upset the interlocutory ruling made by the Examiner also noted that the Texas evidence would be before it during its decision-making deliberations since an offer of proof had been made. The Commission stated:

“We note that the movants, with the approval of the examiner, have made an offer of proof with respect to the testimony which is the subject of the motion. It will be available for our consideration when the case comes before us for decision.” [R. 4892]

El Paso itself during the proceeding did not hide its position on being “volunteered.” At the pre-hearing conference, its counsel stated:

“MR. REIFSNYDER: El Paso has no application in this case; El Paso has no unfilled capacity by which we could make deliveries to Pacific Gas and Electric Company. Therefore, we are not a competing applicant in this case, it has not been El Paso who offered any testimony. We have not filed any prepared testimony. That is all I think I can contribute.” [R. 49]

On subsequent questioning by the Examiner during the course of the hearing to ascertain whether El Paso had changed its position, counsel replied:

“MR. REIFSNYDER: Yes, Your Honor, our position is still the same. We are not — we have no application on file, we have no unfilled capacity by which we could furnish any additional gas supplies to Pacific Gas and Electric Company. I have

listened to all of this debate about the Gulf Pacific testimony. My only knowledge of it, so far as the effort to incorporate any of it in this record, comes from the statement of Mr. Shivers at the prehearing conference, at which time he indicated the pages which he would wish to incorporate from Mr. Hunsacker's [sic] testimony and those exhibits. If it would be of any assistance to Your Honor, I have those pages here I believe and I have the exhibits, but beyond that I have nothing to add in addition to the statement that I made previously." [R. 425]

This position was confirmed later in the proceeding:

"As I stated previously on the record, El Paso has no excess capacity by virtue of which it could make deliveries at this time to Pacific Gas and Electric Company. Its system is operating virtually at capacity, in terms of the contracts which it now has." [R. 1377]

El Paso, subsequently, in briefs before the Examiner supported the application of PGT with the following language:

" . . . on the basis (1) of the evidence in this record that the incremental cost of the volumes sought to be purchased by PG & E will result in decreased costs of transportation to El Paso for gas coming through Kingsgate and (2) of the testimony in this record that this proposed expansion will not impair PGT's obligation to increase deliveries up to an aggregate of 300,000 Mcf per day to El Paso and (3) finally, of the assurance of the executives and other witnesses of both PG & E and PGT that

these additional volumes will not again result in cutbacks on purchases from El Paso at Topock with resulting financial detriment to El Paso, its already-connected producers and others affected by such cutbacks in the Southwestern area, El Paso does not object to the granting of the certificates here sought.” [Brief of El Paso Natural Gas Company, dated Nov. 15, 1965, p. 5]

IV.

ARGUMENT

A. THE COMMISSION CONSIDERED THE STATE OF TEXAS PROPOSAL ON THE MERITS, BUT FOUND THE BENEFITS FROM THE PGT APPLICATIONS MORE IN THE PUBLIC INTEREST.

City of Pittsburgh v. F.P.C., 237 F.2d 741 (D.C. Cir. 1956), and *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F.2d 608 (2d Cir. 1965), relied on by petitioners, do not mean that the Commission must consider and discuss every alternative to a proposed project. The learning of these cases is that the Commission must scrutinize reasonable and feasible alternatives. To read into these cases a broader meaning requiring complete analysis of all alternatives, even those proposed by the uninformed or unknowledgeable, would heap an impossible administrative burden upon regulatory agencies.

The Commission itself recognized its duty in this regard in its *Rock Springs* decision,³ relied on by petitioners. That case further shows the nature of alternative evidence required in a major supply pipeline case. *Rock Springs* involved several applications to serve additional natural gas to the market in southern California. The "Rock Springs" project involved the construction of a pipeline from certain gas fields in the Rocky Mountain area near Rock Springs, Wyoming, to California. In denying that project, the Commission stated:

³ El Paso Natural Gas Company, 30 F.P.C. 77 (1963).

“The most important respect in which this project fails to meet the requirements of the public convenience and necessity is revealed in the evidence showing that other means of supplying the California market would be less costly. *The principal evidence on this question was presented by Transwestern, although some evidence was introduced by El Paso and the staff.*” [30 F.P.C. 77, 85 (Emphasis added).]

The principal evidence of the alternative to which the Commission referred was introduced by a pipeline company which had intervened in the proceedings (Transwestern Pipeline Company). The evidence was of a comprehensive and detailed nature including not only construction costs of the facilities proposed, but also incremental and rolled-in costs of the gas to be delivered. Thus, in *Rock Springs, supra*, the Commission had before it evidence of a physical alternative proposed by a pipeline company which was ostensibly ready, willing and able to perform the service.

This is to be contrasted with the evidence of the so-called alternative sought to be introduced in the case below. The evidence sought to be introduced here was from a separate and completely unrelated proceeding, and it was not being introduced by a pipeline company willing and able to render service. Rather, it is being introduced by a non-pipeline, the State of Texas, in an attempt to “volunteer” El Paso to supply the volumes of gas proposed to be supplied by PGT. Moreover, as earlier noted,⁴ El Paso, through its counsel, on a number

⁴ Pages 8 and 9.

of occasions, specifically disavowed its willingness and *its ability* to provide the volumes of gas which is the subject of the instant case.

Even though the evidence proposed by Texas had these shortcomings, it is apparent that the Commission did consider and weigh the possibility of El Paso providing alternative supplies, as the commission indicated it would (R. 4892). This is clear by the following statement in the Commission's Opinion:

“Unlike the *Rock Springs* proceeding, the record in this case does not demonstrate that alternative methods exist for providing the needed volumes of additional gas at rates and under conditions more advantageous than those which will be achieved by certification of PGT's instant application.⁵

In the testing of the sufficiency of the evidence on this issue, it should be noted that the Commission had before it for decision at the time the instant decision was prepared the enormous record in *Transwestern, supra*. The Commission, in its expertise, could refer to this evidence; and by so referring, it could flesh out the inadequacies of Texas' skeletal proposal to the advantage of petitioners. With the issuance of Opinion No. 500,⁶ which decided *Transwestern, supra*, this Court can test the adequacy of the Texas proposal in much the same

⁵ Pacific Gas Transmission Company, Opinion No. 495, Mimeo p. 3,F.P.C.(1966) (R. 5259).

⁶ Pacific Gas Transmission Company, Opinion No. 495, F.P.C. (1966), was issued June 15, 1966. Transwestern Pipeline Company, *et al.*, Opinion No. 500, F.P.C. (1966), was issued July 26, 1966.

manner as the Commission did. The test does not take long and is dispositive of the issue raised.

**B. PG&E's INCREMENTAL COSTS FOR THE
INSTANT PGT GAS SUPPLIES WERE SUB-
STANTIALLY LOWER.**

In the statement from the Commission's PGT Opinion quoted above, the alternatives proposed by others were found wanting in at least two respects:

1. Rates, and
2. Less advantageous conditions.

With respect to rates, it is petitioners' contention that the rate which El Paso could deliver Texas gas to PG&E at the California-Arizona border was 22 cents per Mcf, compared to the cost to PG&E for the PGT gas at the California-Oregon border of about 24 cents. The 22-cent figure is a misstatement of not only the facts in this proceeding, but also the facts in *Transwestern, supra*, from which the figure was derived.

In *Transwestern, supra*, El Paso did present testimony that *its* incremental cost of delivering an additional 575,000 Mcfd — the 250,000 Mcfd basic application plus the 325,000 Mcfd additional supply discussed earlier — was 22 cents per Mcf. However, this means that *El Paso's* overall total additional cost for delivery of these added volumes is 22 cents per Mcf. This is not the cost to PG&E since joint facilities serving other customers were to be used to make these additional sales. The savings resulting from these additional volumes must be spread over the sales to all of the customers, and all who use the joint facilities must benefit. The Commission recognized this fact, and it had before it in *Transwestern*,

supra, sufficient information to compute and compare the incremental price to PG&E for added volumes from El Paso.

PG&E's rate at 100 percent load factor has been for some time past 30.08 cents per Mcf at 14.9 psia. This rate is equal to 29.74 cents per Mcf at 14.73 psia. El Paso proposed a reduction in its border price if its application to deliver the initial 250,000 Mcf to Pacific Lighting were granted. In Appendix B, Schedule 2, Sheet 1 of 2, to Opinion 500, the Commission shows that this reduction results in a border price of 29 cents.

El Paso further indicated that if its Chaco-Needles project for the sale of an additional 325,000 Mcf to Pacific Lighting over and above the initial 250,000 Mcf were granted, a further reduction of ¼ cent in its price might possibly result. Assuming *arguendo* that this further reduction could be made available with the Texas "volunteered" El Paso project which would involve sales of additional supplies to PG&E, the incremental cost to PG&E of the added volumes with these assumptions could be computed as follows:

$$\begin{array}{rcl}
 1,239,000 \text{ Mcfd} \times 365 \times 28.75\text{¢} & = & \$130,017,563 \\
 1,037,000 \text{ Mcfd} \times 365 \times 29.00\text{¢} & = & \underline{109,766,450} \\
 & & \$ 20,251,113 \\
 \hline
 \frac{\$20,251,113}{202,000 \text{ Mcfd}^7 \times 365} & = & 27.47\text{¢ per Mcf} \\
 & & \text{(incremental cost to PG\&E)}
 \end{array}$$

The incremental cost above could be affected by other possible reductions to El Paso's border price. In *Trans-*

⁷ 202,000 Mcfd at 14.73 psia equals 200,000 Mcfd at 14.9 psia.

western, supra, the Commission noted that further downward adjustments in El Paso's border price may result from the effect of lower gas purchase prices resulting from the Permian Basin decision, a lower rate of return, and the flow through of tax benefits resulting from liberalized depreciation.⁸ It has been estimated that the Permian Basin area rate case could result in a 1 cent per Mcf reduction in purchased gas costs, and that the downward adjustment resulting from a lower rate of return and the flow through of liberalized depreciation could be an additional $\frac{3}{4}$ cent. Assuming again for purposes of argument that all of these reductions will be available at the maximum amounts, the assumed 29 cent border price shown by the Commission in Appendix B, Schedule 2, Sheet 1 of 2 would become 27.25 cents. Using the 27.25 price in place of the 29 cent price, and again assuming *arguendo* that an additional $\frac{1}{4}$ cent reduction would flow from added volumes to PG&E in the manner discussed above, the incremental cost would be 25.7 cents. Thus, the range of incremental cost is 25.7 cents and upward which is much higher than the incremental cost to PG&E of 22.6 cents to 23.6 cents per Mcf for the new PGT gas.

C. OTHER CONDITIONS OVERWHELMINGLY FAVORED THE PGT PROPOSAL.

With respect to the other conditions, the record is equally clear and the contrast more convincing.

Take, for example, a comparison of the cost of facilities to deliver additional gas. The cost of PGT's facilities and *related Canadian facilities* to deliver the 200,000

⁸ Transwestern Pipeline Company, *et al.*, Opinion No. 500, Mimeo p. 43, FPC (1966).

Mcf/d required by PG&E to the California-Oregon border are estimated to be \$24,974,000, or \$125 per Mcf of daily capacity added (Ex. 19, p. 2, R. 2411). This compares with El Paso's cost for its initial 250,000 Mcfd delivery of \$50,442,000 or \$200 per Mcf of added capacity (R. 2932).⁹ Furthermore, although precise cost figures are not available, it is clear that the cost of bringing El Paso gas from Topock on the Arizona border to the Bay area load center exceeded the minimal cost for transporting the same amount of gas purchased from PGT at the Oregon border to the same load center.¹⁰

Another example of the comparison is the supply of gas. The applicant presented a full showing on supply and reserves; Texas did not.

A further advantageous condition to the PGT project is the savings resulting to other customers of PGT in the Pacific Northwest. PGT's witness testified that the in-

⁹ Comparing El Paso's costs for the initial 250,000 Mcfd delivery is not an appropriate comparison. However, it is the one most generous to petitioners' contentions. Under the provisions of Transwestern Pipeline Co., *et al.*, Opinion No. 500, F.P.C., (1966), these facilities are now being devoted to added deliveries to Pacific Lighting. The more correct comparison should use the \$77,810,000 cost for the added 325,000 Mcfd capacity testified to by Mr. Hunsaker (R. 2932). This results in a cost of \$239 per Mcf of added capacity.

¹⁰ The cost of incremental supplies delivered to the load center in Antioch is shown in Exhibit 61, page 2 (R. 3051). These costs are less than the costs of El Paso gas at the Arizona border before even considering the cost of transporting the Texas gas some 400 miles to PG&E's load center. Added facilities for Arizona border to load center deliveries are discussed at R. 2546.

creased deliveries by PGT will reduce the overall rate for gas transported for sale in the Northwest by a total of \$2,500,000 for the years 1966 through 1970 (R. 1432). For this reason the project was supported by the regulatory agencies of the States of Oregon, Washington, and Idaho.

D. EL PASO'S PRESENT AVAILABLE CAPACITY IS INTERRUPTIBLE; PG&E'S CONSUMERS REQUIRED FIRM CAPACITY.

Petitioner, "California Gas Producers Association" adds a further twist to the El Paso-as-an-alternative theory. This petitioner contends that the added supplies needed by PG&E are available from El Paso without the construction of any additional out-of-state facilities (California Gas Producers' Brief, pp. 24-27).

The information used by this petitioner to support this position was provided by El Paso's counsel during the hearing. These figures, which are compiled in Exhibit No. 46 (R. 2880), show that on a few isolated days — three only are shown in the exhibit — El Paso did, in fact, provide volumes of gas to PG&E and Pacific Lighting in excess of its contractual commitments.

However, the furnisher of the information — El Paso's counsel — was fully aware of the misleading use to which these figures could be put. He, therefore, issued the caveat that this capacity was not available every day. He cautioned:

"MR. REIFSNYDER: I have no objection to the figures proposed by the State of Texas going into the record if Your Honor feels that they are relevant,

but I wish the record to reflect, in connection therewith, that on cold winter days, the requirements of El Paso's customers east of California are such that curtailment of the interruptible and portions of the firm industrial segments thereof are required and on such days El Paso would not be able to deliver to its California customers gas over and above its firm quantities.

* * *

"These figures are correct, and I did furnish them to counsel for the State of Texas in accordance with the request which he made on the record earlier in this hearing. I have no objection to those figures going in, if my qualifying remarks are also made a part of the record." [R. 1377]

It is thus apparent that the excess capacity which petitioner believes exists is only available for interruptible volumes. The record demonstrates, however, that PG&E's needs are for firm deliveries. Capacity available now and then on an interruptible basis will not satisfy the firm needs of consumers, who rely on their gas appliances daily for cooking and heating.

V.

CONCLUSION

In conclusion, we note that Section 7 of the Natural Gas Act requires that an *applicant* be both *able* and *willing* to perform the service for which authorization is sought.¹¹ El Paso, as the facts already show, was not an applicant and was neither *able* nor *willing* to provide the service required by the consumers.

If the Commission had by some chance found that the Texas evidence showed a feasible alternative, it could not have directed El Paso to render the service.¹² All it could have done would have been to reject the application of PGT.¹³ To have taken that course when there was uncontradicted evidence of a need for additional firm supplies and uncontradicted evidence showing that the granting of the PGT authorization would benefit gas consumers in four states by providing lower costs would have been contrary to the public interest, and reversible error.

¹¹ “. . . [A] Certificate shall be issued to any qualified applicant therefor . . . if it is found that the applicant is *able* and *willing* properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the Requirements, Rules, and Regulations of the Commission thereunder, . . .” [15 U.S.C. §717f(e).]

¹² Natural Gas Pipeline Company of America, *et al.*, Docket No. CP62-243 (Order issued Feb. 24, 1966).

¹³ City of Pittsburgh v. Federal Power Commission, 237 F.2d 741 (D.C. Cir. 1956).

We submit the Commission's decision was more than appropriate under the circumstances and it should be affirmed.

Respectfully presented,

SOUTHERN CALIFORNIA GAS COMPANY

SOUTHERN COUNTIES GAS COMPANY
OF CALIFORNIA

PACIFIC LIGHTING SERVICE AND
SUPPLY COMPANY

By ROGER J. NICHOLS

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Roger J. Nichols

Nos. 21310, 21313, 21314

In the
United States Court of Appeals
For the Ninth Circuit

CALIFORNIA GAS PRODUCERS ASSOCIATION,
INDEPENDENT OIL AND GAS PRODUCERS OF
CALIFORNIA, JADE OIL AND GAS COMPANY,
THE STATE OF TEXAS, TEXAS INDEPEND-
ENT PRODUCERS & ROYALTY OWNERS
ASSOCIATION, WEST CENTRAL TEXAS OIL
AND GAS ASSOCIATION and PERMIAN
BASIN PETROLEUM ASSOCIATION,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

Brief of Intervenor
Pacific Gas Transmission Company

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January 30, 1967

FILED

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Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

Brief of Intervenor
Pacific Gas Transmission Company

*To the United States Court of Appeals for the Ninth Circuit
and the Honorable Judges Thereof:*

PRELIMINARY STATEMENT

The orders of the Federal Power Commission (Commission) here on review granted authority requested by Pacific Gas Transmission Company (PGT) in applications to that Commission more fully described hereinbelow.

The Statement of the Case and Questions Involved will, we assume, be fully covered in the brief of the respond-

ent Commission. Therefore, this brief will be confined to a statements of facts and argument answering the briefs of petitioners and that of the amicus curiae.

STATEMENT OF FACTS

PGT owns and operates a 614-mile, 36-inch diameter pipeline extending from the International Boundary near Kingsgate, British Columbia, to the Oregon-California boundary. This section of pipeline is a portion of a 1400-mile pipeline project (the project) which transports natural gas from fields in the Province of Alberta, Canada to the San Francisco Bay Area served by Pacific Gas and Electric Company (PG&E). The project operates through the joint efforts of five participating companies. These participants and their respective functions are summarized below:

- (1) *Alberta and Southern Gas Co. Ltd.* (Alberta and Southern), a wholly owned Alberta subsidiary of PG&E, purchases natural gas from producers in Alberta, arranges for its transportation in Alberta and through British Columbia to the International Boundary, and sells it there to PGT (R. 234-235).
- (2) *The Alberta Gas Trunk Line Company Limited* (Trunk Line) transports within the Province of Alberta the gas purchased at processing plants by Alberta and Southern. It was incorporated by a special act of the legislature of Alberta for the purpose of performing this same function for all projects exporting gas from Alberta. It is not affiliated with any of the other companies participating in the project. (R. 235)
- (3) *Alberta Natural Gas Company* (Alberta Natural), a company incorporated and authorized by special act of the Parliament of Canada to transport gas in interprovincial and foreign commerce, transports gas for Alberta and Southern and for Westcoast Transmission Company Limited (Westcoast)

from Alberta through British Columbia to the International Boundary near Kingsgate, British Columbia. Two-thirds of its common stock is owned by PGT and the remaining one-third by the public (R. 236).

- (4) *Pacific Gas Transmission Company* (PGT), a California corporation, transports gas, pursuant to a certificate of public convenience and necessity issued by the Commission on August 5, 1960, from the International Boundary through Idaho, Washington and Oregon to the California border. In addition, it transports as a contract carrier gas purchased from Westcoast by El Paso Natural Gas Company (El Paso). Fifty and eight-tenths percent (50.8%) of its common stock is owned by PG&E (R. 236-237).
- (5) *Pacific Gas and Electric Company* (PG&E), a California corporation, purchases gas from PGT at the Oregon-California border and transports it through its own pipeline facilities for a distance of 296 miles to Antioch, California, where the gas enters its integrated transmission and distribution system serving northern California (R. 237).

The PGT portion of the project was authorized by the Commission in 1960 (*Pacific Gas Transmission Co.*, 24 FPC 134).¹ Having in mind the size of the potential reserves in Western Canada² and the rapidly increasing demand for gas in northern California, the 36-inch pipe-line, which was oversized for the initial certificated volume, was considered

1. The Canadian portion of the project was constructed pursuant to authorizations obtained from Canadian provincial and federal governments following extensive hearings before the Alberta Oil and Gas Conservation Board and the National Energy Board.

2. Canada's Royal Commission on Energy has found it "not unreasonable to expect an ultimate recovery of 300 trillion cubic feet of natural gas" from the "Western Canada sedimentary basin." *Pacific Gas Transmission Co.*, Docket No. G-17350, *et al.*, 24 FPC 134, 144.

appropriate because its through-put capacity could be increased substantially by simply adding compressors at a reasonable cost. The project was supported by all of the representatives of the consumers upon whom it would have any effect including, among others, the State of California, the California Public Utilities Commission (California Commission), and the City and County of San Francisco (San Francisco).

On January 12, 1965, PGT applied to the Commission for authority to take advantage of the availability at minimal cost of additional transmission capacity to bring gas to PG&E at a low incremental cost. It proposed to increase its authorized deliveries to PG&E of 415 M²cf (415,000,000 cubic feet) per day by 200 M²cf per day in two steps: the first 100 M²cf on November 1, 1966 and the second on November 1, 1967. The proposal was simply to add compressors at a cost of \$13,857,000. By this expenditure of about 10 percent of the original cost³ of the pipeline its capacity could be increased by 50 percent. As a result, the cost to PG&E of this additional increment of gas was estimated to be 22.60, 23.36 and 23.60 cents per 1000 cubic feet (Mcf) in the years 1968, 1969 and 1970, respectively. (R. 1306)

In addition the transport cost for the gas destined for delivery to El Paso at points on the PGT system where El Paso takes delivery will decrease by the proposed expansion as the following comparison shows: (R. 1341)

	With Proposed Expansion	Without Proposed Expansion
1967.....	5.80¢	6.91¢
1968.....	5.76	7.10
1969.....	5.80	7.05
1970.....	5.85	6.95

3. The cost of PGT's portion of the original project was \$116,940,000 (R. 4903, 4908 and 5257).

The total savings in transportation cost to El Paso and its customers in the states of the Pacific Northwest between 1966 and 1970 will amount to \$2,500,000 (R. 1342).

PGT's 1965 applications received the unanimous support of the consumers represented in the proceeding before the Commission. The State of California, through the California Commission (which regulates PG&E) and the States of Idaho, Oregon and Washington all expressed their support of the applications, as did San Francisco. The staff of the Commission, subject to certain conditions, recommended that the certificates applied for be granted. The Pacific Lighting Companies⁴ expressed their support. El Paso which, as hereinafter discussed, supplies a major portion of PG&E's gas needs by deliveries at the Arizona-California border, said that it had no unfilled capacity by which it could make comparable deliveries to PG&E and that it did not have a competing project (R. 49). It made no objection to the granting of the certificates requested.

Nevertheless, in the face of this rather impressive support, certain producer representatives and the producing State of Texas, the petitioners herein, expressed their opposition.

On February 17, 1966, the Presiding Examiner issued his Initial Decision in which he granted the authorization requested by PGT. Following the receipt of briefs on exceptions and in opposition to exceptions, the Commission, on June 15, 1966, issued its opinion and order issuing certificate for the construction by PGT of the necessary compressor facilities and authorizing the importation of the additional 200 M³cf of natural gas.

PGT has proceeded to install the authorized compressors

4. The Pacific Lighting Companies are Southern California Gas Company, Southern Counties Gas Company of California and Pacific Lighting Service and Supply Company.

and they are now in operation delivering the additional volumes of gas to PG&E at the Oregon-California border.

Certain additional facts by way of background are essential to a full appreciation of the Commission's actions in this case:

For many years El Paso has been delivering and selling approximately 1,025 M²cf of gas per day to PG&E at the Arizona-California border near the Town of Topock pursuant to certificates issued by the Commission. PG&E transports the gas purchased from El Paso in its own 502-mile, 34-inch diameter pipeline from Topock to Milpitas, California, at the south end of the San Francisco Bay, near the PG&E load center.

El Paso also delivers and sells gas to the Pacific Lighting Companies at the Arizona-California border at two points: one near Topock and the other farther south near Blythe, California. The certificates issued by the Commission authorizing El Paso to make these sales to the Pacific Lighting Companies provided for 1,130 M²cf per day in 1965 when PGT's instant applications were filed to increase its deliveries to PG&E.

However, more than one year earlier, on October 11, 1963, El Paso had filed an application with the Commission for authority to increase its deliveries to the Pacific Lighting Companies by 250 M²cf per day. On November 17, 1963, it filed an amendment to said application offering as a separate proposal to deliver up to 575 M²cf per day. At that time Transwestern Pipeline Company (Transwestern) had pending applications before the Commission for authority to increase its deliveries to the Pacific Lighting Companies by 340 M²cf per day. On October 21, 1963, a little over a year before PGT's instant applications were filed, the Commission consolidated for hearing the applications of El Paso and Transwestern with that of the Gulf-Pacific Pipeline

Company (Gulf-Pacific). The latter company, a subsidiary of Tennessee Gas Transmission Company, had earlier filed an application with the Commission for authority to transport after five years 570.8 M²cf per day from Humble Oil Company's reserves in Texas to the Southern California Edison Company (Edison) and 294.25 M²cf per day from the same source to the Los Angeles Department of Water and Power. This gas was to be used by the two purchasers as fuel for their steam electric generating plants. Edison and the Department of Water and Power were then (and are now) the largest customers of the Pacific Lighting Companies. Hearings were conducted on these consolidated applications from June 1, 1964 for 169 days, and the matter was finally submitted to the hearing examiner for decision on March 17, 1965. The transcript consisted of 28,022 pages and 897 exhibits.⁵ These proceedings will be referred to in this brief as the "*Gulf-Pacific case*."

In its application to the Commission and in its evidence introduced in the *Gulf-Pacific case*, El Paso set forth a specific price proposal for deliveries of the additional volumes of gas to California. El Paso told the Commission that if its application to increase deliveries to the Pacific Lighting Companies by 250 M²cf per day was authorized, it would reduce its rates to all of its California customers by $\frac{3}{4}$ cent per Mcf, providing that its gas purchase costs did not increase substantially in the meantime. El Paso also said in its application that it would reduce its rates by another $\frac{1}{4}$ cent per Mcf if its proposed 325 M²cf additional expansion in deliveries to the Pacific Lighting Companies was authorized. The price (the filed rate tariff) for El Paso's deliveries to the Pacific Lighting Companies and to PG&E at the California-Arizona border was and for many years had

5. Transwestern Pipeline Co., *et al.*, FPC, Mimeo. Op. 500, p. 7, Docket No. CP63-204, *et al.*, July 26, 1966.

been the same. The price was then and is now 30.08 cents per Mcf at 14.9 psia for deliveries at an annual load factor of 100%.

Furthermore, it appeared at the time of the hearings below that El Paso's rate for deliveries to California could be reduced by another 1 cent per Mcf if the reductions of producer rates ordered by the Commission in the *Permian Basin Area Rate* case were sustained on appeal, and if El Paso was required by the Commission to pass on to its customers the resulting reduction in its gas purchase costs. As a consequence of these three possible reductions totaling 2 cents per Mcf, it appeared as though El Paso's rate for gas sold to PG&E and the Pacific Lighting Companies might be reduced to about 28.08 cents per Mcf at 14.9 psia, which, converted to 14.73 psia, would be 27.75 cents per Mcf.⁶ However, the Commission's *Permian Basin* decision was remanded to the Commission on January 20, 1967 in *Skelly Oil Co., et al. v. Federal Power Comm'n*, F.2d (10th Cir. 1967).

Thus the Commission, through El Paso's application, its official files, and through evidence taken under one of its hearing examiners, was explicitly informed as to the price

6. In PGT's Brief to the Commission opposing Exceptions this 27.75 cents per Mcf figure was used for comparative purposes (R. 5220).

It could be argued that if PG&E would activate a $\frac{1}{4}$ cent per Mcf reduction in the price it pays for El Paso deliveries to it, by reason of purchasing an additional 200 M²cf from El Paso, that the incremental cost of that additional volume would be somewhat lower than the 27.75 cents per Mcf estimate. On that basis, the incremental cost would still be considerably in excess of the incremental cost to PG&E of the additional 200 M²cf per day from PGT. Of course El Paso, in the *Gulf-Pacific* case, indicated that such a $\frac{1}{4}$ cent per Mcf reduction would not occur for a 200 M²cf per day portion of its illustrative 325 M²cf per day expansion to the Pacific Lighting Companies. Therefore, the 27.75 cent per Mcf estimated cost to PG&E for an additional 200 M²cf per day from El Paso is the most reasonable estimate for purposes of comparison with the PGT cost to PG&E.

at which El Paso would sell additional volumes of gas to California.

On July 26, 1966, the Commission issued an order denying the application of Gulf-Pacific and granting the applications of Transwestern and El Paso to increase their deliveries to the Pacific Lighting Companies by 340 M²cf and 250 M²cf per day, respectively. On December 9, 1966, the Commission reaffirmed its action in its opinion and order on rehearing (FPC Opinions Nos. 500 and 500-A (Mimeo), FPC).

ARGUMENT

I. The Commission's Conclusion That the Project Expansion Is Supported by an Adequate Gas Supply Is Based Upon Substantial Evidence and the Commission Properly Concluded That Canada Is a Reliable Source of Gas Supply.

The State of Texas (Texas) and Texas Independent Producers & Royalty Owners Association, West Central Texas Oil and Gas Association, and Permian Basin Petroleum Association (TIPRO, *et al.*) argue⁷ that:

- (a) The project gas supply is inadequate to support the proposed increase in deliveries to PG&E;
- (b) The Canadian sources are undependable;
- (c) The original application, which resulted in the certificate issued by the Commission in 24 FPC 134 for the construction and operation of PGT's pipeline from Canada to California, was uncontested.

A. The Evidence Supporting the Commission's Finding That the Gas Reserves Are Adequate.

The Oil and Gas Conservation Board of Alberta, with the approval of the government of Alberta, granted a permit to

7. The Texas and TIPRO, *et al.* arguments concerning an alleged alternative source of supply to PG&E are covered in other portions of this brief.

export the increased volumes from Alberta (Ex. 8, R. 2319-2326) and the National Energy Board of Canada, with the approval of the Canadian government, issued a license to export the increased volumes from Canada (Ex. 20, R. 2417-2426). These authorizations to export were based on the determinations of the Alberta and national boards that the export volumes were supported by known reserves of gas.

In addition to these determinations by the Alberta and Canadian regulatory authorities that an adequate gas supply exists to support the proposed expansion, a study of the gas reserves dedicated to Alberta and Southern and the deliverability of these reserves was submitted in the proceedings by a witness for PGT. The total recoverable gas reserves of pipeline gas available to Alberta and Southern as of November 1, 1964, were estimated by this witness (Ex. 1, p. 1, R. 1786) to be 5,509,340 M²cf.⁸

These proved reserves were estimated to be sufficient to meet PGT's estimated delivery requirement for 17 years from November 1, 1964, and to have a life index of 23.1 years (Ex. 1, p. 5, R. 1790). The proved contracted reserves alone, which have a life index of 19.2 years, would be sufficient to meet the estimated delivery requirements for 13 years from November 1, 1964 (Ex. 1, p. 4, R. 1789).⁹

8. These reserves were classified as follows:

Under contract	4,574,411	M ² cf
Under option	553,513	
subtotal	5,127,924	
Other available	381,416	
Total	5,509,340	

"Under contract" and "under option" are self-explanatory. "Other available" are reserves in several fields not covered by contract or option but available for contract as no competing pipeline is purchasing gas from the field.

9. Texas makes the strange argument that the gas supply is somehow defective because additional wells will have to be drilled

B. The Commission Properly Concluded on the Evidence Herein That the Gas Purchase Contracts Subject to the Canadian Regulatory Authorities Are a Reliable Source of Supply.

About 98 percent of the gas supply for the original project authorized by the Commission in 1960 was purchased under Form A and B contracts. These contracts contained the price renegotiation clause about which Texas and TIPRO, *et al.* now complain (Texas brief, p. 14; TIPRO, *et al.* brief, p. 9). In its opinion at that time, 24 FPC 134, the Commission, at page 137, said:

“Beyond these limiting factors, there remains the primary responsibility of the Canadian authorities to regulate producer and pipeline rates in such a way as to insure that the mutual benefits of the project as a whole will continue. A careful review of the Canadian legislation, including the National Energy Board Act, the Alberta Pipe Line Act, and the Alberta Gas Utilities Act, and the determinations made thereunder with regard to this project, demonstrates that the Canadian regulatory authorities now have a comprehensive rate and certificate jurisdiction at least equal to our own, and broad enough, in letter and spirit, to give effect to the principles of international comity and mutual responsibility on which the continuing success of this project ultimately depends. This legislation embodies the same ‘just and reasonable’ standards as are found in the Natural Gas Act and guarantees that the American and Canadian consumer will be treated alike.”

The Canadian laws there referred to by the Commission have not changed. Indeed, the petitioners do not even claim

in the future to maintain deliverability. This is always the case, because as gas is produced the pressure in the reservoir drops and additional wells must be drilled to maintain the volume of delivery. This was a known fact within the expertise of the Commission, as it is a fact present in the gas supply supporting every certificate issued by the Commission.

that they have. There was no evidence introduced below which in any way questioned the above quoted conclusions of the Commission. Quite the contrary was true: the evidence demonstrated that the original project will be improved in all respects by the expansion. The gas reserves and the gas purchase contracts are improved and the costs are reduced, all of which are of benefit to the United States consumers.

In its 1960 opinion, the Commission also addressed itself to the question of the Canadian producer contract prices. The Commission there said (at 24 FPC 134, at page 137):

“The most important of these costs is the cost of purchased gas reflecting Canadian producer prices. In this connection it is worth noting that Alberta and Southern has entered into option agreements with several major producers covering areas containing both established and prospective reserves of great size. These agreements commit the producers to sell large additional volumes of gas at the same prices as those in the present contracts, when and as needed for the contemplated future expansion of this project. These reserve acreage contracts should have an important stabilizing effect on field prices in the foreseeable future.”

Reserve appreciation under the original Form A contract referred to by the Commission in the above quotation accounts for 46 percent of the reserves supporting the proposed expansion (R. 461). The remaining 54 percent of the reserves supporting the proposed expansion are covered by the new Form D contract (R. 461). Some of this 54 percent consists of reserves located in the same fields as those which are covered by the original contracts. Of the reserves in these fields, some are owned by producers with whom Alberta and Southern has existing contracts, and

some are owned by others (R. 325). Nevertheless, all these producers agreed to the new Form D contract for the sale of gas from reserves not covered by the original contracts (R. 359).

The remaining portion of the 54 percent of reserves supporting the expansion is located in fields from which Alberta and Southern does not now purchase gas and these reserves are also committed under Form D contracts. The Form D contract has the same price schedule as the contracts supporting the original certification. However, it has important improvements from the buyer's standpoint (R. 325-326). One such improvement is that the set schedule of prices established for the entire life of the contract is not subject to change (R. 326). The sellers, under Form D contracts, are not entitled to have the prices reopened.¹⁰

The witness sponsoring the gas supply contracts was Mr. S. Robert Blair, who negotiates with the Alberta producers on behalf of Alberta and Southern. He testified that in his opinion, on the basis of the present prices being paid for gas in Canada and the new Form D contracts establishing a set schedule of prices, there was virtually no possibility that the prices paid by Alberta and Southern would be changed by renegotiation in 1968 (R. 367). This points up one of the most important aspects of the proposed expansion. The new Form D contracts which support the expansion have a very beneficial effect upon the gas prices in the old contracts supporting the gas supply of the original project. These new contracts, with their set schedule of prices, establish a virtual lid on the prices in the old contracts supporting the project authorized in 1960.

10. Except for the four contracts for a minimal volume of gas in the Wilson Creek field.

In view of the demonstrated ability of Alberta and Southern to improve the price provisions in its gas supply contracts together with the practical desire of Alberta producers to continue supplying the California market and the comprehensive producer regulatory powers provided by the Alberta Gas Utilities Act, the Commission was well within its discretionary powers in concluding that the gas supply for the proposed expansion was reliable.

C. The Consistent Support of the Representatives of the Consumers Benefited by the Original Project and the Instant Expansion Program Does Not Raise the Presumption That the Project Is Contrary to the Public Interest as Implied by Texas and TIPRO, et al.

Texas and TIPRO, *et al.* make the unique contention that the application resulting in the existing certificated project was uncontested and therefore in some way the public interest has not been protected. It was not contested because it was supported by the representatives of the consuming public, just as the representatives of the consuming public unanimously supported the instant expansion before the Commission. There were many more intervenors in the original certificate proceedings before the Commission (24 FPC 134) than there were in this proceeding. The project as a whole was completely reviewed in 16 days of hearing, and one only need read the 56 page Presiding Examiner's Initial Decision therein to see that all aspects of the project were thoroughly analyzed and discussed before the certificate was issued by the Commission. The unanimous support of consumer interests resulting in a prior uncontested proceeding, in our opinion, demonstrates that the Commission's authorization of the original project was in the public interest and does not, as Texas and TIPRO, *et al.*, imply, demonstrate the exact opposite.

II. The Commission Properly Refused to Accept the Misleading Arguments of Texas, TIPRO, et al., and the California Gas Producers Association et al. (CGPA) as to the Price at Which El Paso Gas Was Available to PG&E.

El Paso's rate to PG&E for firm gas is presently composed of a two part rate: (a) a monthly demand rate of \$2.312 per Mcf of the contract volume that El Paso is obligated to deliver on each and every day at PG&E's request, and (b) a commodity rate of 22.48 cents per Mcf which is paid for each Mcf taken by PG&E. (R. 3091-3094) The El Paso tariff is based on 14.9 pressure base and the resulting rate, giving effect to the demand and commodity components and a load factor of 100%, is 30.8 cents per Mcf or 29.74 cents per Mcf at 14.73 psia, the pressure base at which all the PGT rate and cost estimates in these proceedings are computed.

Petitioners have incorrectly used the commodity portion of the full El Paso rate as a comparison with the cost to PG&E of the additional gas from PGT. They do so by quoting, and referring¹¹ to a portion of the cross-examination (R. 1221) of Mr. Frank by counsel for El Paso:

"Q. At page 6 of your exhibit No. 18 for identification, Columns 12 and 13, contain some load factor figures, does it not, sir?

A. Yes, sir.

Q. Is the company policy to take Canadian gas at 100 percent load factor?

A. I made this computation and I assumed that we would on the basis that the incremental cost would be less than the incremental cost of El Paso gas.

Q. What figures did you use for that?

A. I used 22 cents per Mcf and approximately 18 cents per Mcf Canadian, 22 cents for El Paso.

Q. Are those border prices or what prices are they?

11. TIPRO, et al, brief, p. 11.

A. 22 cents is approximately the border price at the California border.

Q. At Topock?

A. At Topock, right; and the 19 cents was approximately the purchase price of the gas at the field.

Q. And the 18 cent price contains no transportation cost from the field?

A. No, sir.

Q. What is the distance from the Alberta fields to the load center at Antiock (sic), sir, approximately?

A. Over a thousand miles."

Following a quotation of a portion of the above, TIPRO, *et al.* argue:

"The above sworn testimony, given by Applicant's own witnesses under cross-examination, tends to confirm the fact that the El Paso (Texas) gas is cheaper than gas proposed to be imported under this application." (TIPRO, *et al.* brief, p. 12)

Texas cites the same testimony as the basis for the following italicized portion of its brief:

"The testimony of PGT's own witness herein reflects that the incremental price of such available 'Texas' gas at the California border (Topock) is approximately 22 cents per Mcf, which is a cheaper price than even the original incremental price of PGT's proposed imported gas at the California border (R. 1219-1222)." (Texas brief, p. 21)

They made the same argument to the Examiner and the Commission. Fortunately the Examiner and the Commission were quite familiar with the term "incremental cost" and knew that Mr. Frank in the quoted cross-examination was using the term in a different context than used elsewhere in the proceedings. As a consequence neither the

Examiner nor the Commission was misled into accepting the Texas, TIPRO, *et al.*, argument.

As the Commission knew, the average cost to a purchaser of existing certificated deliveries is composed of the fixed costs (nonvariable) and the costs which vary with the volumes delivered. The fixed costs are comprised primarily of depreciation, return, taxes, overhead, and other similar items. The cost of gas component (and compressor fuel costs) will vary depending upon volumes delivered. Thus, under PGT's cost of service tariff, the cost to the purchaser of volumes taken in excess of its minimum obligation (for which it must pay all of the fixed costs) is composed practically entirely of the cost of gas and compressor fuel cost. The fuel cost is so minimal on a unit basis that it can be ignored for all practical purposes. This cost of gas taken in excess of the minimum obligation is often referred to as an incremental cost. In the above quoted portion of the cross-examination of Mr. Frank, he compared the incremental cost to PG&E of gas purchased from PGT and El Paso for the purpose of determining which source would be taken at the higher load factor. The incremental cost to a purchaser, as mentioned above, is the unit cost at which volumes can be purchased from a certificated supply in excess of minimum purchase obligation. Thus, under El Paso's present rate structure, which is composed of demand and commodity components, the incremental unit cost to PG&E of volumes in excess of the minimum obligation is approximately 22 cents per Mcf at 14.73 psia, as the demand component must be paid by PG&E regardless of the volume taken. The cost to PG&E of gas purchased from PGT at the minimum obligation volume includes all of the fixed costs of transportation to PG&E from Alberta. Accordingly, the incremental unit cost to PG&E of volumes in excess of the minimum

obligation is essentially the gas purchase cost. Mr. Frank therefore used as an incremental unit cost of volumes purchased by PG&E from PGT in excess of the minimum obligation volume the amount of 18 cents. This, in the context of his testimony, is obviously comparable to the El Paso commodity price of 22 cents.

The incremental cost to PG&E of volumes taken between the minimum obligation to purchase and the maximum obligation to deliver under the El Paso and PGT tariffs should not be confused with the incremental cost of additional volumes from PGT or El Paso which require expansion of their systems.

As mentioned above, the incremental cost to PG&E of the additional volumes from PGT is 22.60 cents, 23.36 cents and 23.60 cents per Mcf in the years 1968, 1969 and 1970, respectively (R. 1306). The cost to PG&E of additional volumes from El Paso is El Paso's "G" rate which as shown above is now 29.74 cents per Mcf but could possibly be reduced to about 27.75 cents per Mcf.

Petitioners also make a further rather confusing and misleading argument. They persistently confuse the firm, long-term supply (at least 20 years) which the Commission authorized PGT to provide to PG&E, with the possibility of temporary "best efforts" gas. Such best efforts gas is available from a pipeline seller on such days as its facilities serving other customers are not in full use and hence can be used to deliver gas over and above the seller's firm obligation to deliver.

Such best efforts gas is available to PG&E from El Paso under certain conditions and at certain times. As such gas may be available from the use of facilities idle because other customers with a priority to receive gas from the capacity are not demanding the gas at the particular time,

the price for such best efforts gas is less than that for firm gas. On occasion the Commission has authorized El Paso to deliver such best efforts gas at the commodity rate on such days as the El Paso facilities are not needed to serve the contract demands of its other customers. This is a non-dependable supply available to PG&E and is not comparable to the PGT firm, long-term supply. Here, again, the expertise of the Examiner and the Commission protected them from being misled by the petitioners' arguments.

III. Substantial Evidence Supports the Commission's Conclusion That the Record Does Not Demonstrate That Alternative Methods Exist for Providing the Needed Volumes of Additional Gas to PG&E at Rates and Under Conditions More Advantageous Than Those Which Would Be Achieved by Certification of PGT's Application.

Mr. J. S. Moulton, who for over 20 years was the PG&E officer responsible for acquiring gas to meet its growing demands, testified (R. 1622-1623) that he knew of no alternative source of additional out of state gas available to PG&E at a cost to it as low as the incremental cost of the additional 200 M²cf per day that PGT sought authority to deliver.

El Paso was an intervenor in the proceedings before the Commission. It had no alternative plan to serve PG&E. El Paso's counsel stated that it had no unfilled capacity by which it could make deliveries to PG&E (R. 49, 425).

Texas did not seek to introduce evidence of an alternative plan of delivering gas from Texas to PG&E in California. Instead, it sought to introduce into this case the pipeline design evidence introduced by El Paso in the *Gulf-Pacific* case of a design for pipelines and other facilities¹²

12. Consisting of 499.8 miles of large diameter pipe, 21.9 miles of smaller diameter pipe, compressors, a large gasoline plant, a

estimated to cost \$77,081,000 to deliver 325 M²cf per day to the Pacific Lighting Companies (Ex. 56, R. 2920-2933). As this was simply an attempt to introduce a fragment of El Paso's evidence in a then pending application to serve the Pacific Lighting Companies, it did not establish a complete alternative project to serve PG&E, and the Examiner properly excluded the evidence but permitted it to be introduced into the record as an offer of proof. It was thereby made available for the Commission's consideration. Of course, it was available in the official records of the Commission all along, as was El Paso's evidence in the *Gulf-Pacific* case and its application to the Commission therein concerning the rate it would place into effect for gas delivered through new facilities to the Pacific Lighting Companies at the California border.

The Commission found, that there were "... ample supplies of gas available in Permian Basin and other areas in the southwest . . ." (R. 5260), but that the facilities for bringing this gas to California in the amounts desired by consumers were not available nor could they be for some time. No other finding could have been made in view of the evidence before the Commission in this case and the then pending *Gulf-Pacific* proceedings.

Furthermore, the Commission found that there was no demonstration that alternative methods exist for providing the needed volumes of additional gas *at rates and under conditions* more advantageous than proposed by PGT (R. 5259).

large purification plant and appurtenant equipment. (Ex. 56, R. 2927-2929)

The estimated cost of PGT facilities consisting entirely of compressors to increase the through-put of the pipeline from Canada to the California border, was \$13,857,000 and the total cost for the expansion of the project including the cost of additional compressors in Canada to transport the gas from the fields in Alberta to the California border was estimated at \$24,974,000. (R. 1328-1329)

The alternative source of supply upon which Texas relied was El Paso, and the El Paso price range was a known fact. The Commission gave full effect to the offer of proof and the El Paso proposal known to it from the *Gulf-Pacific* case application and hearings, and came to the only conclusion that could be reached on the facts.

Subsequently the Commission granted El Paso's application to deliver additional gas to the Pacific Lighting Companies.

The Texas argument seems to be that as a matter of law the Commission was required to ignore the fact that El Paso was engaged in a competitive proceeding to deliver gas to the Pacific Lighting Companies and hence was not in a position to offer additional gas to PG&E. Likewise, Texas would have the Commission ignore the fact known to it through its official files that El Paso's rate for additional deliveries to the Pacific Lighting Companies would not be less than from 27.75 cents per Mcf, over 4 cents per Mcf higher than the cost to PG&E of the additional volumes from PGT.

Texas, TIPRO, *et al.*, and CGPA argue that *City of Pittsburgh v. Federal Power Comm'n*, 237 F.2d 741 (D.C. Cir. 1956) and *Scenic Hudson Preservation Conference, et al. v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965) establish the proposition that the Commission committed error in not ordering the Examiner to admit the evidence which was the subject of the offers of proof.

These cases do not apply to the circumstances of this case. Here as discussed above the Commission considered the alternatives referred to by petitioners.¹³ Furthermore, the

13. In its order of December 17, 1965, the Commission pointed out that the offers of proof "will be available for our consideration when the case comes before us for decision. We are of the opinion that this is the proper way to handle the matter". (R. 4890-4893)

cited cases stand for the common sense principle that when there is an apparent possibility of injury to the public interest arising from the granting of the applications applied for, reasonable alternative proposals should be considered. This principle was well summed up in the case cited by the Second Circuit in support of its *Scenic Hudson* decision, *Michigan Consolidated Gas Co. v. Federal Power Comm'n*, 283 F.2d 204 (D.C. Cir. 1960), *cert. denied* 364 U.S. 913 (1960) where the Court said (at page 226) :

“These matters, *on their face*, reflected the basis for an alternative to total abandonment, so apparently in the public interest, that their consideration at some point in the proceedings was indispensable to the validity of any public interest determination in support of total abandonment.” (Emphasis supplied)

In the *City of Pittsburgh* case the applicant sought to abandon the use of a pipeline for the transmission of natural gas and convert it to the transportation of oil. The applicant proposed to use the capacity in another pipeline owned by it to transmit the volume of gas then being carried in the line it sought to convert to the transportation of oil. The City of Pittsburgh claimed that this would increase costs to consumers because the transfer of the gas from the line to be converted to the other pipeline would *use up* the capacity in that line which could be expanded at little expense and when consumers later required additional gas the necessary pipeline expansion would be more expensive.

The Commission refused to consider the problem of future expansion. The Commission said that it had no jurisdiction to consider any alternatives to the specific proposal made by the applicant. In discussing the issue the court said :

“That Texas Eastern would soon move to expand its gas deliveries was apparent throughout the proceeding.
 During the pendency of this appeal, Texas East-

ern's plans became concrete and, on December 19, 1955, it filed an application with the Commission for authority to expand its capacity . . . at a cost of about \$60 million." (Emphasis added) 237 F.2d 741, 751-752.

Therefore, the court held that in the circumstances of the case "The exclusion of evidence relating to future expansion and *the refusal to consider future expansion in determining the public convenience and necessity* were erroneous." (Emphasis added) (237 F.2d at 753)

The *City of Pittsburgh* case stands for the proposition that the Commission must not consider each application out of context with the known factors concerning the public interest in the situation before it. And that is the very principle followed by the Commission in this case.

El Paso was a party to the proceedings below. It did not have a proposed project in competition with that proposed by PGT. It did, however, have an application pending for a project, on which hearings had been concluded, to serve another customer at a specified price. Texas sought to have introduced a fragment of the evidence from that other case relating to additional pipelines and appurtenant facilities costing approximately \$77,000,000) and ignoring completely the evidence that the rate for deliveries to California in that case was proposed to be no lower than 27.75 cents per Mcf. Texas also sought to subpoena the same evidence.¹⁴ This offered evidence added nothing to the proceed-

14. The proposed subpoena directed to Mr. Hunsaker reads in pertinent part as follows: "... to testify concerning the availability of natural gas to northern California through facilities of El Paso Natural Gas Company," and bring, "all documents, work papers, memoranda and other written instruments relating to the above matters."

The subpoena of this pipeline design expert was not directed to the *price* at which gas through El Paso facilities would be sold to PG&E. Texas knew from his testimony in the Gulf-Pacific case that Mr. Hunsaker was unable to testify as to the prices (rates) El Paso would charge for additional deliveries of gas to California.

ing, as no one would dispute that pipeline additions could be constructed by El Paso to bring additional gas to California. The point is that the evidence offered by Texas did not show an alternative project, *i.e.* it left out the important factor of *price*.

However, the Commission was aware from the El Paso application and evidence in the *Gulf Pacific* case of the price at which El Paso would deliver additional volumes of gas to California. Under the broad principle laid down by the *City of Pittsburgh* case it could not ignore that fact of which it was aware. Furthermore, where in the *City of Pittsburgh* case subsequent events showed that the possibility of expansion had blossomed into a concrete proposal and therefore the alleged adverse effect on consumers was imminent (as the court noted in its opinion), here in this case subsequent events have conclusively demonstrated the correctness of the Commission's conclusion that there was no alternative project as advantageous to the public interest as that proposed by PGT and authorized by the Commission.

In *Scenic Hudson Preservation Conference, et al. v. Federal Power Comm'n, supra*, 354 F.2d 608 (2d Cir. 1965), the court held that because of the danger to an important part of our national heritage, the scenic Hudson River, the Commission had the obligation to consider alternative methods of obtaining necessary electric energy for New York. Here, again, the case was based upon the same common sense broad principle that the Commission should not ignore important factors of the public interest of which it was aware. The important factor in that case was the beauty of the Hudson River and the effect on it of a large hydroelectric development. Given that fact the court held that the Commission had the duty to give the public "active and affirmative protection."

In *Michigan Consolidated Gas Co. v. Federal Power Comm'n*, 246 F.2d 904 (3d Cir. 1957), *cert. denied* 355 US 894 (1957) no such overriding factor of public interest was involved and the Court held that the Commission properly rejected an alternative proposal which was deficient in material aspects. The court went on to hold that the burden of proving the feasibility of an alternative project was on the opposing party offering it and not upon the Commission.

There was no given fact of possible injury to the public in this proceeding before the Commission, quite the contrary was true. In this case we have a project receiving the unanimous support of the representatives of the public interest. They knew that the addition of compressors at a cost equal to 10 percent of the existing pipeline would add 50 percent to its capacity, and would reduce the cost of gas delivered to consumers in California, Oregon, Washington and Idaho. These were the given facts concerning the public interest in this case.

Texas and TIPRO, *et al.* were attempting before the Commission to frustrate a project having the unanimous support of the affected consuming public by offering an incomplete alternative project based on fragments of evidence from another case then pending before the Commission. This incomplete alternative proposal was based on adding over 499 miles of pipeline and other facilities to the El Paso system at a cost of over \$77,000,000 even though El Paso, repeatedly stated on the record that it had no proposal to serve PG&E.

In the circumstances of this case the Commission, considering the evidence, the offers of proof, and the El Paso proposals known to it from the *Gulf Pacific* case, properly found that there was no demonstrated alternative method for providing the additional volumes of gas needed to meet

the demands of PG&E's customers at rates and under conditions more advantageous than those proposed by PGT.

IV. The Examiner and Commission Were Correct in Refusing to Follow the CGPA's Misleading and Incorrect Argument That PG&E "Estimated 'Cutbacks' of California Produced Gas in Order to Provide a Market" for Canadian Gas.

The petitioner group herein called CGPA is composed of the California Gas Producers Association, consisting of several medium-sized independent producers and a number of smaller producers of natural gas in California, the Independent Oil and Gas Producers of California (successor to the Oil Producers Agency of California), consisting of a number of independent producers accounting for approximately 25 percent of California's oil production, and Jade Oil and Gas Company, an independent producer with some production in northern California. Although CGPA does not oppose the certificates requested here, it seeks to have the initial delivery date of November 1, 1966 delayed one year. Its purpose in seeking such a delay is to improve the already enviable market position gas producers now have for their northern California gas production. PG&E is presently paying 30 cents per Mcf (on a 1000 Btu basis) for all gas purchased from California producers.

The Commission followed the Examiner's Initial Decision in which he carefully considered the evidence and the arguments of CGPA concerning the PG&E market requirement and its California gas supply (Initial Decision, pp. 18-22, R. 4919-4923). The Examiner found:

- (a) "There is no question PG&E will require large volumes of gas in the immediate future to supply its rapidly expanding market demand." (R. 4919)
- (b) "Thus, if the importation of the first increment of 100,000 Mcf of Canadian gas were deferred for two

years and California produced gas could be substituted, it was estimated the California customers of PG&E would be required to pay additional costs of some \$8,030,000." (R. 4921)

(c) "From all of the testimony it is clear that PG&E will not only require all of the usable . . . California gas available but also the volumes here sought to be imported to meet its reasonably anticipated future supply requirements." (R. 4922-4923)

The evidence fully supports the Examiner's conclusions.

The gas supply available to PG&E, exclusive of the authorized additional supply of 200 M²cf per day, will be inadequate to meet the design peak day demands of PG&E firm customers beginning in 1968 and thereafter as follows:¹⁵

Year	Deficiency
1968.....	26 M ² cf
1969.....	229
1970.....	486

Furthermore, the authorized additional supply of 200 M²cf per day by November 1, 1967, will merely postpone the design peak day deficiency by one year until 1969. By 1970, even with the additional supply, the design peak day deficiency will be 286 M²cf per day (Ex. 18, p. 10, R. 2403). Even with the additional supply, PG&E will still be unable to meet the average daily demands for gas on its system in the following volumes (Ex. 18, p. 7, R. 2400) :

Year	Curtailement
1967.....	225 M ² cf
1968.....	345
1969.....	441
1970.....	634

15. From Ex. 18, p. 10 (R. 2403), by subtracting from the last righthand column the additional supply of 200 M²cf per day.

Practically all of the California dry gas reserves within the area in which PG&E purchases California gas are under contract to PG&E, the subject of discussions for contract, or are committed to others, principally oil and chemical companies (R. 1614). Very minor quantities of gas are available from scattered wells which have not been connected for various reasons, such as the volume being insufficient to justify the construction of a gas line to the wells or because of low pressure or heating value (R. 1614). In short, there is no appreciable quantity of uncommitted California dry gas reserves available to PG&E (R. 1614-1615). In the opinion of Mr. J. S. Moulton, who was for approximately 20 years the PG&E officer responsible for forecasting requirements for natural gas and for the purchase of gas necessary to meet these requirements (R. 1610), the history of dry gas discoveries in California provides no pattern that PG&E can safely rely upon in planning acquisition of additional gas supplies to meet its prospective firm requirements (R. 1650). For this reason, if California gas reserves, in addition to those already committed, are not known to exist at the time PG&E must reach the decision as to the purchase of additional gas, and out-of-state reserves are known to be available, PG&E, in fulfilling both its legal and its moral obligations to its customers, must contract for the known reserves and take all other necessary steps to make them available by the time they will be required (R. 1615).¹⁶

16. CGPA argues that PG&E should depend on the future discoveries of California gas and alleges that "in order to secure a permit to remove the necessary quantities of gas from the Province of Alberta for importation into northern California, PG&E presented precisely the type of evidence—indicating the probability of future gas discoveries in Alberta—which as to major

Mr. Moulton estimated that if the initial delivery dates for the additional 200 M²cf per day were postponed for one year as argued by CGPA, and PG&E had to purchase the additional gas from producers in California, it would cost PG&E and presumably its customers an additional \$8,030,000 (R. 1622).

Furthermore, even if the California reserves shown on page 28 of the CGPA Brief to the Commission on Exceptions (R. 5057) could be produced at the 1965 rate of production and if PG&E were to purchase at that 1965 rate, the life index of these existing California reserves would drop to slightly less than seven years by the end of 1970, as shown on the following table:

Year	Net Gas Produced	Reserve Dec. 31	Index Years End of Year
1965	222,000 M ² cf	2,653,700 M ² cf	11.9
1966	222,000	2,431,700	10.9
1967	222,000	2,209,700	9.9
1968	222,000	1,987,700	8.9
1969	222,000	1,765,700	7.9
1970	222,000	1,543,700	6.9

However, the plain fact of the matter is that the existing California gas reserves cannot maintain the 1965 delivery rate. As shown on Mr. S. A. Haavik's Exhibit 17 p. 9 (R. 2392), the annual deliverability of the existing California reserves will drop from 220,000 M²cf in 1965 to 157,600 M²cf in 1968 and thereafter to 112,200 M²cf in 1970. It seems quite clear that the 1965 rate of production of California dry gas

supplies of northern California dry gas it refused to present here." (CGPA Initial Brief, p. 13)

The Oil and Gas Conservation Board of Alberta, Canada, in reserving a 30 year supply for Alberta requirements makes the reasonable assumption that over that 30 year period there will be additional reserves discovered equal to two years of average discoveries, and those seeking to export gas from Alberta present evidence on discoveries directed to that issue (Ex. No. 22, Appendix D, R 2744-2748).

could be maintained only by the discovery and development of as yet unknown reserves. This cannot be relied upon. The history of discoveries in California has been sporadic. For example, only 16,200 M²cf of reserves were added in 1956, and only 14,800 M²cf in 1959. Nevertheless, the evidence shows that, if reserves adequate to support the 1965 rate of production should be discovered and offered for sale by the producers, PG&E could market the production as it will have a demand for gas far in excess of that which can be met by the additional 200 M²cf per day applied for in this proceeding.

V. The Commission Did Not Abuse Its Discretion in Refusing to Adopt, in This Case, a Policy of Restricting the Importation of Natural Gas from Canada as Argued for by IPAA.

Texas and the Independent Petroleum Association of America (IPAA) argue that the Commission erred in failing to consider the effect of the proposed importation of gas on domestic producers. This argument is entirely unfounded. The Commission, in its opinion, specifically stated that it "will consider carefully in every case the effect of importations of natural gas upon the domestic industry and upon the exploration and development which may be needed to develop future gas supplies." (R. 5260) The Commission further stated:

In the circumstances of the present case, where the need of the market for additional gas is established, where the basic facilities to procure the Canadian gas have already been constructed, where no competing application for transportation and sale from an alternative domestic source has been filed by any pipeline, and where there will be a reduction in unit cost of service which will benefit the consumers of four states, we think the benefits to be derived from granting these

applications far exceed any alleged detriments to the domestic petroleum industry or its exploration and development program. (R. 5260)

The Commission's jurisdiction over the importation of natural gas is derived from section 3 of the Natural Gas Act (15 U.S.C. § 717b), which provides: "The Commission shall issue" such import authorizations "unless... it finds the proposed importation will not be consistent with the public interest."¹⁷

It was IPAA's position in the proceedings below that the Commission should follow the policy established by the Mandatory Oil Import Program and restrict the importation of natural gas. That program does not apply to the importation of natural gas and, as the Commission found, "... in the circumstances of this case, the factors, even if otherwise applicable, which gave rise to the Program, do not operate to prevent the authorizations sought by PGT." (R. 5260)

The Mandatory Oil Import Program establishes the policy of the Executive branch of the government in respect to the restrictions on the importation of petroleum. It was instituted by Presidential Proclamation in 1959, after about 12 years of study, so that imports of crude oil, unfinished oils, and finished products "would not impair the national security." However, President Eisenhower, by Proclamation No. 3290, dated April 30, 1959, announced that restricting the importation of oils transported from the country where they are produced into the United States by overland

17. IPAA misconstrues the clear meaning of Section 3 in the opening paragraph of its argument (IPAA brief, p. 3) where it states that Section 3 of the Natural Gas Act "authorizes the Federal Power Commission to permit the importation of natural gas only when such importation will be 'consistent with the public interest.'"

transportation was not necessary in order to prevent imports from "threatening to impair the national security."

By exempting imports from Canada, the development of Canadian resources was encouraged, thereby providing an additional source of oil available to the United States in case of a national or international emergency. Surely, in view of the long-standing friendly relations, the many economic ties, and the military solidarity between the two nations, no one can seriously contend that the sources of Canadian oil might be cut off from the United States during a period of emergency.

IPAA, although there is no such Presidential Proclamation with respect to natural gas, is here arguing that the Commission committed an error of law by refusing in this case to adopt a far reaching policy establishing quota restrictions on the importation of natural gas from Canada. IPAA so argues even though the Presidential Proclamation establishing mandatory imports on oil excludes oil produced in Canada. It is apparent, therefore, that the IPAA is not here seeking the establishment of a gas import control program comparable to the Mandatory Oil Import Program, but is asking instead that the Commission be required by this Court to inaugurate restrictions on the importation of natural gas far more severe than those applicable to oil.

The Commission did not abuse its discretion in refusing to adopt such a policy in the circumstances of this case.

CONCLUSION

For the foregoing reasons, we urge this Court to affirm the Commission's decision.

Respectfully submitted,

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January 30, 1967

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MALCOLM H. FURBUSH

**In the United States Court of Appeals
for the Ninth Circuit**

CALIFORNIA GAS PRODUCERS ASSOCIATION, INDEPENDENT
OIL AND GAS PRODUCERS OF CALIFORNIA, JADE OIL
AND GAS COMPANY; THE STATE OF TEXAS; TEXAS IN-
DEPENDENT PRODUCERS & ROYALTY OWNERS ASSOCIA-
TION, WEST CENTRAL TEXAS OIL AND GAS ASSOCIA-
TION, and PERMIAN BASIN PETROLEUM ASSOCIATION,
PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT
PACIFIC GAS TRANSMISSION COMPANY; PUBLIC UTILITY
COMMISSIONER OF OREGON; SOUTHERN CALIFORNIA
GAS COMPANY, SOUTHERN COUNTIES GAS COMPANY
OF CALIFORNIA and PACIFIC LIGHTING SERVICE AND
SUPPLY COMPANY; CITY AND COUNTY OF SAN FRAN-
CISCO, INTERVENORS

**On Petitions to Review an Order of the
Federal Power Commission**

**BRIEF FOR RESPONDENT FEDERAL POWER
COMMISSION**

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January 30, 1967

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**In the United States Court of Appeals
for the Ninth Circuit**

Nos. 21310, 21313, 21314

CALIFORNIA GAS PRODUCERS ASSOCIATION, INDEPENDENT
OIL AND GAS PRODUCERS OF CALIFORNIA, JADE OIL
AND GAS COMPANY; THE STATE OF TEXAS; TEXAS IN-
DEPENDENT PRODUCERS & ROYALTY OWNERS ASSOCIA-
TION, WEST CENTRAL TEXAS OIL AND GAS ASSOCIA-
TION, and PERMIAN BASIN PETROLEUM ASSOCIATION,
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v.

FEDERAL POWER COMMISSION, RESPONDENT

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GAS COMPANY, SOUTHERN COUNTIES GAS COMPANY
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CISCO, INTERVENORS

**On Petitions to Review an Order of the
Federal Power Commission**

**BRIEF FOR RESPONDENT FEDERAL POWER
COMMISSION**

STATEMENT OF JURISDICTION

These are proceedings to review an order of the Federal Power Commission issued June 15, 1966 (R. 5254-5263).¹ Petitioners' timely applications for rehearing (R. 5264-5277, 5278-5284, 5285-5313), filed on July 8, 11, and 12, 1966, were denied by order of August 4, 1966 (R. 5315-5316). The petitions for review were filed on September 29, October 1 and 3, 1966. Jurisdiction of this Court rests upon Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), *infra*, p. 34.

STATEMENT OF THE CASE

The Commission order challenged here authorized Pacific Gas Transmission Company (PGT), a natural gas pipeline, to import from Canada an additional 100,000 Mcf of natural gas per day commencing on or about November 1, 1966,² and a further 100,000 Mcf per day commencing on or about November 1, 1967, for transportation and sale to the Pacific Gas and Electric Company (PG&E) in California. The project will use the existing pipeline, with the addition of some new compressor facilities. The questions presented by the petitioners relate generally to the reasonableness of the Commission's findings with respect to, *inter alia*, the market for this gas, the adequacy of the underlying supply and the failure to show that the market could be supplied by alternative means at rates and conditions more in the public interest than the project approved. The basic position of petitioners is, and has been throughout these proceedings, that the import of additional supplies of Canadian gas is unnecessary on the ground that gas for the

¹ Petitioners also state they are seeking review of the procedural order of December 17, 1965 (R. 4890-4893). While this order is not reviewable as such, the alleged procedural errors are properly before this Court to the extent they may inhere in the June 15, 1966, order under review.

² This importation has now commenced.

expanding California market can be furnished by California and/or Texas producers.

Background.—The project approved by the Commission in this case involved a fuller utilization of existing pipeline facilities authorized by the Commission on August 5, 1960. *Pacific Gas Transmission Co.*, 24 FPC 134. By that order, Pacific Gas Transmission was authorized to construct and operate a 614 mile 36-inch pipeline extending from the international border at Kingsgate, British Columbia, to the Oregon-California border. This pipeline was only one portion of about 1400 miles of 36-inch pipeline connecting vast gas-producing fields in the province of Alberta to the facilities of PG&E in northern California. The 1960 order authorized PGT to deliver an average of 415,000 Mcf of gas per day to PG&E and also to transport on a cost-of-service basis more than 100,000 Mcf per day for El Paso Natural Gas Company and its Canadian supplier from the border at Kingsgate to points of connection with El Paso's system in the Pacific Northwest. The cost of PGT's original facilities was \$116,940,000 (R. 4903, 4908, 5257).³

In order to transport and sell the additional 200,000 Mcf of gas per day, PGT sought authority from the Commission to construct facilities, principally for additional compression, costing an estimated \$13,857,000 (R. 2354, 4907).

As previously noted, Pacific Gas Transmission's pipeline is only part of a longer line originating in Alberta, where all the gas is produced and purchased. The gas is purchased from Canadian producers by Alberta and Southern Gas Co., Ltd., a wholly-owned subsidiary of PG&E. Alberta and Southern owns no transmission fa-

³ Though there was no opposition to the issuance of the 1960 certificate as such (disagreement existed as to the terms), the Commission order was issued after a full hearing which included participation, *inter alia*, by the regulatory authorities from the States of California, Idaho, Oregon and Washington, and the cities of Los Angeles and San Francisco, and a full decision by the Examiner. See 24 FPC 134.

cilities. Gas purchased by it is transported through Alberta to the British Columbia border by Alberta Gas Trunk Line Company Limited, which has no corporate connection with the other companies except that Alberta and Southern holds one share of its Class B Group II common shares. The original investment in Trunk Line's facilities prior to the present addition was \$82,638,000. The additional investment required for the present project was estimated at \$6,556,000 (R. 2879, 4906).

The gas is transported through British Columbia to Kingsgate at the international border by Alberta Natural Gas Company, two-thirds of whose common stock is owned by PGT. The additional compressor facilities needed to transport the 200,000 Mcf per day increment involved here will increase its undepreciated investment of \$32,637,000, by about \$5,400,000 (R. 2879, 4906-4907).

After Pacific Gas Transmission delivers the gas to PG&E at the California-Oregon border, PG&E transports it 298 miles to Antioch, California. This section of pipeline originally cost \$54,250,000 and it was estimated that the additional compressor and metering facilities needed for the present project would cost an additional \$5 million (R. 2879).

Hearings and Examiner's Decision.—During the hearings which started on September 15, 1965, and ended on September 29, 1965, evidence was presented by the applicant, as well as by opponents of the importation. In addition, certain evidence was excluded, including, *inter alia*, testimony and exhibits relating to the availability of Texas gas and means of transporting Texas gas via facilities that El Paso had indicated in another case it could construct. In each instance where the proffered prepared testimony was excluded, the sponsoring party made an offer of proof pursuant to Section 1.28(b) of the Commission's Rules of Practice and Procedure. The Commission, by order of December 17, 1965, refused to review the Examiner's exclusions on an interlocutory basis, pointing out that offers of proof had been made and that the excluded evidence "will be available for our con-

sideration when the case comes before us for decision. We are of the opinion that this is the proper way to handle the matter” (R. 4890-4893).

On February 17, 1966, the Examiner issued a decision recommending approval of PGT’s application in the form requested (R. 4902-4929). After discussing the procedural history of the case and the nature of the applications, the Examiner found, *inter alia*, that the supporting gas supply was adequate (R. 4908-4910); that the recommended authorization should not be conditioned to require modification of the terms of the Canadian gas supply contracts (R. 4910-4915); that PGT’s additional deliveries would decrease the costs of gas to both PG&E and the northwest portion of El Paso’s system (R. 4916-4917); and that PG&E’s market would require not only the additional deliveries proposed by PGT, but also all of the usable gas available from California producers (R. 4919-4923).

The Commission’s Opinion.—Upon consideration of exceptions to the Examiner’s decision by the present petitioners, who sought denial of the applications, and more limited exceptions by San Francisco, the California Public Utilities Commission, and the Commission’s staff, the Commission, on June 15, 1966, issued its opinion and order granting the requested authorization (R. 5254-5263). The Commission concluded that while the supply requirements needed to support the more efficient utilization of essentially existing pipeline facilities were less stringent than those for a new pipeline, an adequate Canadian gas supply had been shown (R. 5259). In addition, it found that alternative methods for providing the needed volumes of additional gas at rates and under conditions more advantageous than those to be achieved by certification of PGT’s application had not been shown to exist, and that, in these circumstances, the benefits which the additional PGT importation would give to consumers in four states (California, Washington, Oregon and Idaho) far exceeded any alleged detriment to the domestic petroleum industry or its exploration and development

program (R. 5259-5260). With respect to the market, the Commission found that the new gas from Canada, as well as any available California produced gas, could be absorbed by PG&E's market (R. 5260).

The Commission, rejecting the contentions that the application should be denied because Canadian supplies were unreliable since they could be cut off by the Canadian authorities, said "[w]e think that the close relationship between the United States and Canada renders it unlikely that this sort of difficulty will arise" (R. 5260). It added, in this respect, that the contention was particularly weak in a case such as this where the new gas is to be delivered through essentially existing pipeline facilities. *Ibid.* It also concluded that, in the circumstances of this case, the existence of indefinite price-changing provisions in many of the Canadian producer supply contracts, with a consequent possibility of unknown future price increases, did not warrant conditioning PGT's certificate on its attempt to renegotiate its existing supply contracts to eliminate such provisions.

After the denial of applications for rehearing (R. 5315-5316), the petitions for review followed.

INTRODUCTION AND SUMMARY OF ARGUMENT

The record in this case showed that PG&E has a present market need for the additional deliveries of gas from Canada that PGT has been authorized to make. In fact, the record made it clear that PG&E's future requirements will not even be satisfied by the additional supplies approved here. It may be noted in this connection applications have recently been filed with the Federal Power Commission requesting permission to sell an additional 200,000 Mcf per day to PG&E.⁴ Whether or not these

⁴ Pacific Gas Transmission proposes to sell an additional 200,000 Mcf. See *Pacific Gas Transmission Co.*, FPC Docket Nos. CP67-187 and CP67-188, applications filed December 23, 1966. These applications indicate that PG&E also expects to purchase an additional firm supply of 100,000 Mcf from El Paso.

additional applications will be approved, it is apparent that the present expansion is only part of a continuing increase of out-of-state deliveries required to meet the growing California gas market. Petitioners' claims that the Commission did not adequately consider unapplied-for alternative means of supplying the present market requirements of PG&E are not only inaccurate but should be judged in this context. We will show that petitioners' suggestions for supplying PG&E's present requirements sought to be supplied here plainly did not present viable alternative methods. Not only would the suggested supplies from El Paso have been more expensive, but, in view of the absence of any El Paso application to render such service deliveries, could not have started by November 1, 1966, the date on which PG&E sought to have its new supply delivered.

The Commission fully considered petitioners' contentions that the present supply should not have been certificated because of the possibility of increases, sometime in the future, of Canadian wellhead prices as a result of contract renegotiation and redetermination provisions but reasonably concluded this risk was out-weighed by the known savings to be achieved by the project.

The Commission was also fully warranted in finding that the adequacy of the supply of Canadian gas underlying the project was factually supported and that new imports of natural gas, particularly through an existing, not fully utilized pipeline, should not be denied simply because of the unlikely eventuality that the Canadian government might cut off the requisite supplies for which it has given formal export approvals. Similarly, the Commission reasonably concluded that any possible detriment to the domestic petroleum industry was outweighed by the benefits to consumers to be derived from this particular importation, which permits a more economical use to be made of the PGT pipeline.

While petitioners, in challenging the foregoing Commission determination, contend that the Commission improperly ignored certain facts or considerations, their various contentions, however phrased, are in fact no more

than an attempt to have this Court substitute its policy judgments and evaluations of the facts for those of the Federal Power Commission. This, of course, the Court cannot do.

ARGUMENT

I. The Commission Reasonably Concluded That a Market Exists for the Increased Deliveries Certificated Here

Both the California producers (Br. pp. 5-23) and TIPRO (Br. pp. 13-15) challenge the Commission's factual determination that a market exists for the additional gas sales by Pacific Gas Transmission to PG&E. The Commission's finding is fully supported by substantial evidence.

The record in this case clearly shows not only that PG&E has a rapidly expanding market but that this market, on an annual or average day basis, is by no means saturated by the addition of the supply here at issue. PG&E's forecast of its anticipated average daily requirements, which has not been challenged, is substantially higher than the gas supply it expected to have available even with the 200,000 Mcf increment authorized here. For example, for 1968, the first full year in which the full 200,000 Mcf of gas would be supplied, the estimated market was 2,467,000 Mcf per day, while the estimated supply was only 2,107,700 Mcf, including the new supply (R. 2392, 2400, 4920). Similarly, for 1967, when the first 100,000 Mcf increment was to be made available, PG&E forecast a daily market of 2,336,000 Mcf compared to an expected supply of only 2,095,700 Mcf per day, including the new supply (R. 2392, 2400). In this respect it should be understood that a substantial portion of PG&E's market, like that of most major distributors, consists of interruptible loads for industrial and steam electric uses. Thus, the estimate for 1968 was that 1,479,000 Mcf of the total average daily sales of 2,467,000 Mcf would be sold on an interruptible basis (R. 2400), with the expectation that the interruptible purchasers

would, if necessary, either shut down their operations for short periods or use fuel oil (which is more costly than gas in the PG&E area, R. 1627), as an alternative energy source, particularly for generating electricity.

The California producers, while not challenging PG&E's market estimates, argue at great length (Br. pp. 5-23) that the estimates presented by PG&E as to the supply of gas available from producers in California are much too low and that accordingly the market for the new gas exists here only because PG&E plans to take reduced amounts of gas from California producers. In making this argument, the producers totally ignore the fact that the record shows that, even with the purchases certificated here, PG&E's requirements are such that it could absorb much larger gas supplies from California sources than it estimated would be available—*e.g.*, 241,000 Mcf per day in 1967, 360,000 Mcf per day in 1968, and 650,000 Mcf per day by 1970 (R. 2392, 2400, 4920). In this respect, as the Examiner found (R. 4919-4920), PG&E made it clear that it has consistently made a market for California produced gas as it becomes available and that it expects to continue to purchase all available California gas. Thus, the Examiner found that (R. 4922-4923):

From all the testimony it is clear that PG&E will not only require all of the usable California gas available but also the volumes here sought to be imported to meet its reasonably anticipated future supply requirements. * * * [Footnote omitted.]

Similarly, the Commission concluded (R. 5260) that there "appears to be little doubt that California will absorb all the gas which producers in California can make available to pipelines there."

The California producers' statement (Br. p. 7) that the only way PG&E can justify the additional importation by November 1966 was by relying on a cut-back on California purchases simply ignores these findings and the record. Indeed, even if PG&E could purchase the same quantities of California gas in 1967 as it had in

1964, PG&E's total supply would only be increased by 103,000 Mcf so that the total supply would still, on an average day basis, be 138,000 Mcf less than the anticipated market potential (R. 2390, 2392, 2400). In these circumstances, the Commission had no occasion to address itself to the attack on PG&E's method for predicting available California gas supplies. The California producers' challenge of that method is thus irrelevant and will not be discussed.

TIPRO's attack (Br. pp. 13-15) on the existence of a market is equally misconceived and completely fails to distinguish between peak day and average day requirements. As we have just discussed, the record fully supports the finding that PG&E will be able to market the additional supplies of gas and even more as soon as deliveries commence. The existence of a market for this gas is, contrary to TIPRO's suggestion (Br. pp. 13-14), in no way inconsistent with the fact that PG&E anticipates the ability to meet 100% of the requirements of its "interruptible industrial" requirements through 1969, if it has the additional Canadian supplies certificated here. TIPRO in its brief implies that, therefore, PG&E would be able to meet its entire interruptible requirements and has no need for more gas. But TIPRO fails to recognize that PG&E's interruptible requirements were divided into two basic categories in the exhibits and testimony presented in this case—namely, "industrial" and "company" uses (the latter principally for use in PG&E steam electric generating plants)—so that the non-curtailment of "the industrial interruptible requirements" which did not include PG&E's own uses tells only a very limited portion of the story. Indeed, the record shows that the requirements of PG&E's steam electric plants constitute more than half of the anticipated total interruptible requirements (R. 2401). Unlike the "industrial interruptible" situation, PG&E, even with the additional Canadian supplies here certificated, expected to be able to meet only about 68% of its own annual steam electric requirement in 1966, 69% in 1967, 57% in 1968, 43% in 1969, and

27% in 1970 (R. 1196, 2401).⁵ These figures plainly confirm the existence of a market for the newly certificated supply from Canada. TIPRO also states (Br. p. 14) that one of the applicant's witnesses admitted that there would be no deficiency in PG&E's supplies before the winter 1968-69, citing R. 1162. TIPRO fails to point out that the statement referred to relates only to peak day firm demands (R. 1161-1162, 2403) and not to PG&E's overall market requirements.

Finally, we suggest that TIPRO's argument that a market was not shown to exist is inconsistent with its basic position that Texas gas, rather than Canadian gas, should be used to meet PG&E's present market needs.

II. The Commission Reasonably Concluded That No Alternate Supply Was Available at Better Prices or Conditions for the California Market Proposed to Be Served

All of the petitioners contend (Texas Br. pp. 17-33; TIPRO Br. pp. 6-13; Calif. Prod. Br. pp. 23-26) that the Commission did not adequately consider the possibility of supplying PG&E's growing gas market with gas from domestic sources. Principally, it is contended that lower priced gas could have been obtained by PG&E from El Paso Natural Gas Company, even though that company, an intervenor in this case before the Commission, did not itself make such a claim or even seek to supply the gas.⁶

The Commission reasonably concluded (R. 5259) that "the record in this case does not demonstrate that alternative methods exist for providing the needed volumes of additional gas at rates and under conditions more ad-

⁵ Viewing PG&E's interruptible load on an overall basis, PG&E expected to meet 83% of its entire interruptible load in 1966, 84% in 1967, 77% in 1968, 70% in 1969, and 60% in 1970 (R. 2401).

⁶ The California producers alone also seem to suggest that Transwestern Pipe Line Company, which does not now sell to PG&E and made no request to supply PG&E's additional needs, might have been the source of a cheaper alternative supply.

vantageous than those which will be achieved by certification of PGT's instant application." Petitioners' claims that this finding is invalid because certain evidence excluded by the Examiner would show a more advantageous supply is not supported by that evidence, which was, in fact, before the Commission through offers of proof (R. 2920-3036). The Texas argument that the Commission's consideration of evidence as submitted through offers of proof is insufficient to protect the party making the offer because there is no cross-examination is a startling theory. Plainly there is no valid objection if the Commission accepts proffered evidence at face value. Cf. *F.P.C. v. Natural Gas Pipe Line Co.*, 315 U.S. 575, 584.

Before discussing petitioners' alleged better alternatives, it is necessary to review the service proposed by PGT. PGT proposed to deliver to PG&E on a *firm* basis an additional 200,000 Mcf of gas per day. It would do so by use of an existing pipeline, essentially adding only compressor facilities. Because this increase in deliveries to PG&E of nearly 50% was to be accomplished by an increased facilities' cost of only about 10% (R. 4919),⁷ the unit cost to PGT of delivering its gas to PG&E would be decreased and would automatically be reflected in lower rates to PG&E which purchases this gas under a cost-of-service tariff. The incremental cost to PG&E of the additional 200,000 Mcf was estimated to be 22.6¢ in 1968, 23.36¢ in 1969, and 23.6¢ in 1970 (R. 4916). Furthermore, the reduced cost of service would result in lower rates for the transportation service rendered to El Paso in its Northwest Division. El Paso pays for this service by PGT under a cost of service tariff which, like the rate to PG&E, will be reduced by this expanded use of the PGT pipeline (R. 4917).

⁷ This relates to the cost of both American and Canadian facilities. Contrary to the statement in the Texas brief (p. 14), the cost of Canadian facilities and the effect on north-of-the-border rates appear in the record (R. 678, 819, 1051-1052, 2412, 2414-2416).

As petitioners recognize in urging that better alternatives were available, the incremental cost of PG&E provides an appropriate basis for comparison. But their claims that alternative supplies were available at a better price and on better terms is completely unsubstantiated and demonstrably incorrect.

A. *The Incremental Cost to PG&E For El Paso Gas Under the Hunsaker Testimony Would Be Higher*

The principal alternative source of supply which petitioners claim the Commission did not adequately consider involved an expansion of El Paso's facilities such as that described by Barry Hunsaker, Chief Pipeline Engineer for El Paso Natural Gas Company, in the so-called *Gulf Pacific* hearings involving competitive applications of Gulf Pacific Pipeline Company, Transwestern Pipeline Company, and El Paso to supply increased demands in *southern California*. See *Transwestern Pipeline Co., et al.*, CP63-204, *et al.*, Opinion 500, July 26, 1966.⁸ rehearing denied, Opinion 500-A, December 9, 1966.

The Hunsaker testimony relied upon relates to a method by which El Paso could deliver an additional 325,000 Mcf⁹ of gas per day to California above the 250,000 Mcf expansion which El Paso was seeking to have certificated. The Hunsaker testimony in *Gulf Pacific* offered here does not, contrary to the statements of petitioners, discuss the rates at which El Paso proposed to sell its additional supplies. Nor did any other evidence introduced or proffered in this case. Nevertheless, the Commission was fully aware of the price at which El Paso proposed to sell gas if its expansion proposals were approved. Not only was the *Gulf Pacific* case also pending before the Commission when this case was before it, but, in any event, PGT pointed out to the Commission (R. 5220) that *El*

⁸ Copies of this opinion of the Commission are being lodged with the Clerk for the convenience of the Court.

⁹ California producer brief (p. 24) mistakenly states that the testimony proffered related to the original 250,000 Mcf.

Paso proposed to reduce its rates to an average of 27.75¢ per Mcf, assuming a 1¢ per Mcf reduction in purchased gas costs resulting from the *Permian Basin Area Rate* case,¹⁰ if it were certificated to sell the additional 325,000 Mcf, as well as its originally proposed 250,000 Mcf. More specifically, the record in the *Gulf Pacific* case showed that El Paso proposed to reduce its overall rates by up to ¾¢ per Mcf¹¹ if its basic 250,000 Mcf expansion was authorized, which it now has been. See *Transwestern Pipeline Co., et al.*, CP63-204, *et al.*, Opinion 500, mimeo p. 4.¹² It also indicated that it could reduce its rates by an additional ¼¢ per Mcf if it undertook the 325,000 Mcf expansion discussed by Mr. Hunsaker, this ¼¢ reduction taking effect once all the new facilities were used to sell 500,000 Mcf. *Id.* at p. 4. In the *Gulf Pacific* case, the Commission did not consider the additional 325,000 Mcf warranted. Assuming, *arguendo*, that a 325,000 Mcf expansion had been undertaken for sales to PG&E and assuming that a ¼¢ reduction would still result even though there was a different purchaser and only 200,000 Mcf,¹³ in addition to the 250,000 Mcf for southern California, were sold, the incremental cost to PG&E of this additional 200,000 Mcf would, at the very least, be at least 25.7¢ per Mcf—substantially more than the incremental cost to PG&E of 22.6¢ to 23.6¢ per Mcf for the new PGT gas.¹⁴

¹⁰ *Area Rate Proceeding (Permian Basin)* 34 FPC 159, remanded for further proceedings *sub nom. Skelly Oil Co., et al. v. F.P.C.*, CA10 Nos. 8385, *et al.*, January 20, 1967.

¹¹ El Paso's offer, which was separate from and in addition to any *Permian* rate reductions, was made upon the assumption that its unit purchased gas costs shown in the *Gulf Pacific* proceeding would not have increased by the time its expanded service permitting the rate reduction went into effect.

¹² This reduction will redound to the benefit of all of El Paso's customers, not just those receiving additional gas.

¹³ There is no indication that any of this ¼¢ rate reduction would be forthcoming if only 200,000 additional Mcf were supplied.

¹⁴ In certificating El Paso's proposal, the Commission has indicated that El Paso should reduce its rates further than it had proposed,

Petitioners' claims (Texas Br. p. 21; Calif. Prod. Br. pp. 28-29) that an additional *firm* supply of 200,000 Mcf per day could be purchased from El Paso at 22¢ per Mcf are misconceived. Texas (Br. p. 21)¹⁵ relies on a statement on cross-examination by one of PGT's witnesses that the incremental cost of gas from El Paso would be 22¢. As the Commission was advised (R. 5220), this reference was plainly taken out of context by Texas. For while the witness did talk in terms of an incremental cost (R. 1221), he was not discussing the incremental cost of a new supply. The full cross-examination shows that he was being asked to explain why his projections of gas to be purchased by PG&E from PGT and El Paso for the period from 1965 through 1970 showed purchases from PGT (Canadian gas) at 100% load factor¹⁶ while gas from El Paso, which did not include any new firm supply, would be purchased at somewhat lower load factors (R. 1221, 2399). The witness explained this difference in load factors on the ground that the incremental cost to PG&E of El Paso gas would be about 4¢ *more* than the incremental cost of Canadian gas. Clearly, the 22¢ in-

to reflect a lower rate of return and the flow through of liberalized depreciation. Taking these additional factors into account, we estimate that El Paso's rates might on this basis be reduced to as low as an average of 27¢ per Mcf at 14.73 psia. If El Paso gas were substituted for the 200,000 Mcf supply from PGT, this would mean, on these assumptions, that in 1968 PG&E would be purchasing 1,229,000 Mcf per day from El Paso at 27¢, instead of 1,029,000 Mcf at 27.25¢ (R. 4920). (If the additional gas is not obtained from El Paso, there would be no $\frac{1}{4}$ ¢ reduction resulting from the 325,000 Mcf increment, though PG&E will still have lower rates from El Paso as the result of the increased sales to southern California.) The difference in the total costs of the two supplies would be the incremental cost ^{to} PG&E of an additional 200,000 Mcf from El Paso, which is on an average basis 25.7¢ per Mcf (the total savings to PG&E produced by the $\frac{1}{4}$ ¢ per Mcf reduction in the rate paid for present purchases from El Paso is attributed to the additional purchase of 200,000 Mcf in the calculation of incremental cost of the additional supply).

¹⁵ See also TIPRO Br. pp. 11-12.

¹⁶ Load factor is determined by dividing average day sales by peak day sales.

cremental cost mentioned in the course of this explanation (R. 1221) was a reference to the approximate commodity component of El Paso's two-part rate (composed of demand and commodity components) (R. 3091)¹⁷ and reflects the cost of gas purchased by PG&E from El Paso above the 91% annual minimum commodity obligation (R. 3080), since PG&E would in any event be required to pay a minimum bill reflecting the demand charges and commodity charges for 91% of gas it is contractually entitled to receive (R. 3091-3092). The invalidity of the Texas suggestion that this witness' reference to a 22¢ "incremental cost" is comparable to the total incremental cost of 22.6¢ to PG&E of the additional 200,000 Mcf of Canadian gas is further emphasized by that witness' own comparison of the 22¢ price for El Paso supplies with an 18¢ price for Canadian supplies.

The California producers (Br. pp. 27-29, App. C) make an equally unfounded assertion that PG&E could have obtained a new firm supply of 200,000 Mcf per day from El Paso at an incremental cost lower than its incremental cost of the PGT gas. In arguing (Calif. Prod. Br. p. 29) that the possibility of alternative supplies from El Paso at prices from 20½¢ to 22½¢ existed and should have been analyzed in greater detail, this petitioner relies on patently irrelevant figures.

Thus, the producers first suggest that the new supplies sought by PG&E could be purchased from El Paso under its Excess Gas Service Rate Schedule at 21.22¢ per Mcf.¹⁸ But the proposed 21.22¢ rate under the Excess Gas Service rate schedule is not available for the additional *firm* supply sought by PG&E since that rate schedule by its terms provides for an *interruptible* service, available only when other California customers of El Paso do not take their maximum contracted daily demand (R. 3094).

¹⁷ El Paso commodity rate is 22.48¢ at 14.9 psia, which is equivalent to 22.22¢ at 14.73 psia, the pressure used in this case.

¹⁸ The tariff referred to provides for a 22.22¢ rate at 14.73 psia. The figure used by petitioner apparently assumes a 1¢ reduction for purchased gas costs on the basis of the Commission's *Permian* decision.

The California producers (Br. p. 29) also mistakenly assert that a memorandum prepared by PG&E's witness Moulton in another connection shows that an alternative supply of gas could be purchased from El Paso at between $20\frac{1}{2}\text{¢}$ - $22\frac{1}{2}\text{¢}$ per Mcf. The memorandum (R. 3061) shows on its face that costs referred to are the average costs per Mcf to *El Paso* of its expansion proposals in the *Gulf Pacific* case.¹⁹ But El Paso's incremental cost is very different from the incremental costs of its purchasers. For El Paso sells gas under a tariff which provides the same rates for all firm customers in California. When, as in the *Gulf Pacific* case, El Paso's incremental cost of a new supply is less than the average cost of its existing supply, the result is an overall cost decrease with a consequent reduction in the rates to all customers. Since El Paso sells to more than one purchaser, this means that the benefits of a low cost expansion will be passed on to all its customers. And even if only one is purchasing the entire incremental supply, it will not get the entire cost saving but will have to share it with the other customers. Indeed, as we have indicated, El Paso's expansion for the purpose of increasing its service to southern California will also reduce the rates paid by PG&E.²⁰

Finally, it should be noted that while the Commission accepted the Texas-TIPRO view that there would have been sufficient gas supplies in the Permian Basin and other areas in the southwest to meet the present expansion (R. 5260), it was also correct in pointing out that the facilities for bringing the desired amounts of gas to

¹⁹ This is confirmed on examination of portions of the record in the *Gulf Pacific* case to which the memorandum refers.

²⁰ Concededly, if a new purchase does precipitate overall lower costs, it is reasonable to assume that all the reduced costs to *that* purchaser should be attributed to the new purchase. As we have shown, *supra*, pp. 14-5, n. 14, the incremental cost to PG&E of such a supply from El Paso would at the minimum be 25.7¢ or more than two cents higher than the incremental cost to PG&E of purchasing Canadian gas. But there is absolutely no basis for treating a seller's incremental cost as reflecting the purchaser's incremental cost when the cost savings are distributed among a number of purchasers.

California were not available and could not be for some time. Pertinent to this is the fact that El Paso had not requested authorization to sell PG&E the needed supplies. Even without such an application, the Commission could have rejected or deferred approval of PGT's import proposal if it believed a better means of meeting PG&E's needs could be made available by another means. See *El Paso Natural Gas Co.*, 30 FPC 77 (known as the *Rock Springs* case). While the Commission has no power to require a pipeline to enlarge its facilities, we have no doubt that the aggressive companies serving the California market would take any reasonable opportunity to avail themselves of such an opportunity if the Commission indicated its preference for service by a different company. But assuming, *arguendo*, that the Commission, instead of approving PGT's proposal by its June 15, 1966, order, had issued an order that same date suggesting that El Paso submit an alternative proposal, any such certificate application could have been authorized only after new hearings. Since the California producers contend that no out-of-state gas is needed by PG&E, a thoroughly contested hearing would have been indicated, even assuming no other opposition, with the result the Commission approval in less than a year or year and a half would have been most unlikely.²¹ Plainly, any supply from El Paso could not have come on the line by November 1, 1966, when PGT's additional deliveries were to commence.

Since the Commission reasonably found the existence of a present market requirement for PGT's additional 200,000 Mcf per day supply, the non-existence of a competing application from El Paso and the consequent delay in attaching supplies from such a source plainly indicate

²¹ For example, following the denial of El Paso's application in the *Rock Springs* case, *supra*, on July 12, 1963, it was not until July 26, 1966, as a result of the comparative *Gulf Pacific* proceedings, that the Commission issued its order granting new applications to serve southern California.

that the use of El Paso facilities would not have been a true alternative for the PGT proposal even if, contrary to the facts, it were competitive on a price basis.

B. California Producer Claims of Other Alternatives Are Totally Misconceived

The California producers' suggestion (Br. pp. 28-9) that the Commission should have held that purchases under Transwestern's limited Excess Rate Schedule at 20¢ constituted a viable alternative is absurd. The Transwestern rate schedule (R. 3110) to which the producers refer is by its terms available only to customers purchasing under the Contract Demand Service Rate Schedule (R. 3107). PG&E does not make any purchases from Transwestern, which has committed the entire potential of its California pipeline capacity to the Pacific Lighting companies, serving southern California (e.g., R. 3102-3106). Moreover, the full cheap expansibility of Transwestern's line to California has now been certificated for sales to the Pacific Lighting companies in the *Gulf Pacific* case.²² *Transwestern Pipeline Co., et al.*, CP63-204, *et al.*, Opinion 500, July 26, 1966.

The *Gulf Pacific* case shows that the California border price for Transwestern gas at a 100% load factor would be reduced to 33.2¢ per Mcf, less some reduction indicated in the opinion, once the line is fully utilized. No suggestion has been advanced either in this case or in *Gulf Pacific* that Transwestern could achieve any additional low cost expansion by use of its existing line. Hence the unit cost of any additional Transwestern supply probably would be at least the average cost of its fully utilized line—i.e., in excess of 30¢—or more. In any event, even if the Transwestern expansion had not been approved in the *Gulf Pacific* case, it is apparent that PG&E could only purchase a firm supply from Transwestern at the same overall rates that are to be charged

²² This type of cheap expansibility is precisely the type of expansion authorized for PGT in this case.

the Pacific Lighting companies, *i.e.*, more than 30¢. In these circumstances, the suggestion of the California producers that Transwestern could provide a meaningful alternative supply to the PGT gas for which PG&E has an incremental cost of from 22.6¢ to 23.6¢ was completely unreal.

The California producers also urge (Br. pp. 24-27) that additional supplies of El Paso gas are available to PG&E without the need for the construction of any new facilities and that the Commission did not adequately consider this alternative. While these producers made this contention in their exceptions to the Examiner's decision (R. 5070-5072), they did not repeat it in their application for rehearing and hence this objection may not be considered by the Court. See Section 19(b) of the Natural Gas Act, *infra*, p. 34; *Panhandle Eastern Pipe Line Co. v. F.P.C.*, 324 U.S. 635, 649; *F.P.C. v. Colorado Interstate Gas Co.*, 348 U.S. 492; *Sunray Mid-Continent Oil Co. v. F.P.C.*, 364 U.S. 137, 157; *Wisconsin v. F.P.C.*, 373 U.S. 294, 307. In any event, the suggestion that because El Paso has on some days of a year supplied substantial volumes over its contractual commitment to both PG&E and the Pacific Lighting system, El Paso can therefore make the entire 200,000 Mcf sale to PG&E "at no additional cost" is without basis. The figures to which these producers refer were supplied by El Paso, through its counsel. When he furnished the data he explained that the system capacity to deliver this "best efforts" gas was limited and was not an average daily available capacity since the ability to deliver to California depended on the requirements of El Paso's customers east of California, so that especially on cold winter days the California delivery capacity would be restricted to El Paso's existing firm commitments (R. 1377). Moreover, the basis for the assumption that all excess amounts could be sold to PG&E and none to the Pacific Lighting system is not apparent since both purchasers would seem to have call on such excesses. Plain-

ly, this was not a viable alternative for the firm 20-year supply certificated here.

C. *The Commission Reasonably Authorized the PGT Importation Without Requiring Modification of the Canadian Gas Producer Contracts*

In addition to the erroneous claim that Texas gas could be delivered to PG&E at a cheaper price than the incremental cost to PG&E of the additional 200,000 Mcf from Pacific Gas Transmission, petitioners also suggest (TIPRO Br. pp. 9-11, 12-13; Texas Br. pp. 14-16, 20-21) that the domestic supplies would provide a better alternative because the producers' sales in Canada are not subject to F.P.C. regulation and particularly because many of the sales contracts permitted unlimited price renegotiations or redeterminations in 1968 and five-year intervals thereafter.

It is stated that, by contrast, gas sold in Texas is subject to Commission regulation "in such a manner that its price is firm and definite in each field or area" (Texas Br. pp. 20-21). While the existence of indefinite price-changing provisions in some of the Canadian contracts undoubtedly leaves an element of uncertainty as to future prices, it is also not possible to predict with certainty the prices that may be charged for Texas gas over the next twenty years. The statement in the Texas brief (pp. 20-21) as to the complete firmness of domestic prices is not correct either in contractual or regulatory terms. Contractually, as this Court knows from *Superior Oil Co. v. F.P.C.*, 322 F. 2d 601, certiorari denied, 377 U.S. 922,²³ the Commission has limited the type of price-changing provisions that could be included in producer contracts. But these regulations did not, as implied, call for firm 20-year prices; instead they permit fixed periodic increases without restrictions as to the amounts, as well as price redeterminations or renegotiations every five years, subject to a ceiling of prices

²³ See also *F.P.C. v. Texaco Inc.*, 377 U.S. 33.

in the same area previously approved by the Commission, and provisions permitting changes up to applicable just and reasonable area rates approved by the Commission. See Section 154.93 of the Commission's regulations, 18 C.F.R. 154.93, as amended by 31 Fed. Reg. 15485 (December 8, 1966), *infra*, p. 36.²⁴ Contractually authorized prices in interstate sales by domestic producers may, of course, be collected and retained only if they are authorized by the Commission under its rate regulatory authority.

With respect to sales from the Permian Basin area, the Commission has now determined the maximum just and reasonable rates for the area. See *Area Rate Proceeding (Permian Basin)*, 34 FPC 159, remanded for further proceedings *sub nom. Skelly Oil Co., et al. v. F.P.C.*, CA10 Nos. 8385, *et al.*, January 20, 1967. In that case, the Commission also imposed a moratorium on the filing of increased rates prior to January 1, 1968. But, thereafter the producers, if contractually free to do so, will be able to file for increased rates and, after a maximum of six months, to place such increased rates into effect, subject to refund. Without attempting to speculate on the future course of producer prices in the United States or in the Permian Basin area, it cannot be assumed flatly that they will remain unchanged beyond 1968.

In any event, the Commission, in considering the arguments relating to the Canadian gas supply contracts, recognized that many of the contracts underlying the applicant's expansion proposal contained provisions permitting price renegotiations and price redeterminations based on the weighted average field price paid by the purchaser and hence that there was an element of uncertainty about future prices. It concluded, however, that the contingency of unknown price increases sometime in the future was

²⁴ A similar limitation on Canadian clauses would obviously not be possible. While the Commission could refuse to approve any project based on contracts including any indefinite price changing provisions, this would be more restrictive contractually than the treatment of domestic producers.

out-weighed by the immediate savings to American consumers when the proposed sales commence (R. 5261). In discussing this problem and the potential impact of the uncertainty, the Commission pointed out that while 98% of the gas supply underlying Pacific Gas Transmission's project approved in 1960 was based on contracts containing such indefinite price-changing clauses, 54% of the reserves supporting the proposed expansion were acquired under contracts without such escalation provisions (R. 5260-61, 460-466).²⁵ The remaining 46% of the expansion supply was acquired by extensions to existing contracts to cover reserves added by additional development in already dedicated fields. In view of the willingness of producers to forego indefinite escalation clauses in new contracts, without any higher fixed prices, the Commission reasonably concluded (R. 5261) that the more recent contracting practices would have a retarding effect on any price escalation under indefinite pricing clauses since either the price paid by the purchaser or the market price in the area would presumably be the standard under those clauses.²⁶

In view of the speculative nature of any future price escalations under the indefinite price-changing provisions

²⁵ TIPRO challenges (Br. pp. 10-11) the finding that the new or Form D contracts underlying the additional supply do not contain renegotiation clauses on the ground that some Type D contracts did have renegotiation clauses. The witness explained in this respect (R. 353-354) that *only* four Type D contracts, those relating to Wilson Creek Field, had renegotiation provisions in them. (These four contracts represent less than 2% of the total reserves (R. 1976).) While the percentage of contracts without price renegotiations might be slightly changed on this basis, the basic conclusion that substantial amounts of new gas are purchased without such clauses is not affected.

²⁶ The examiner pointed out, in his detailed discussion of this point (R. 4910-4916), that applicant's witness on Canadian gas supply did not anticipate early increases under the price renegotiation clause (R. 365-368), while a producer witness for TIPRO testified in rebuttal that, in his view, the renegotiation clauses would inevitably result in prices in excess of the fixed escalations, though no price level could be predicted.

in Canadian gas purchase contracts, the Commission was certainly warranted in concluding that the immediate American consumer savings should be given greater weight than the mere possibility of price increases in the future. The full utilization of Pacific Gas Transmission's facilities will by 1968 decrease the unit cost of all the gas delivered by Pacific Gas Transmission to PG&E by more than $3\frac{1}{2}$ cents per Mcf and will reduce the charge to El Paso for the gas Pacific Gas Transmission transports for it from the Canadian border to points in the Pacific Northwest States (R. 4916-4917, 5260).²⁷ And, as the Commission explained (R. 5261), acceptance of the proposal that the expansion authorization be conditioned upon the renegotiation of the supply contracts to eliminate price escalation provisions would unnecessarily have risked a delay in effecting these savings.

III. The Commission Reasonably Found That PGT Has an Adequate Supply of Gas to Render the Expanded Service Here Approved

Texas plainly errs in contending (Br. pp. 9-13) that the Commission did not consider either the adequacy or the reliability of the gas supply underlying Pacific Gas Transmission's proposal to deliver an additional 200,000 Mcf per day to PG&E. There is also no substance to the related claim that, in any event, the Commission's supply findings are not supported.

The Commission expressly found (R. 5262) that "Pacific Gas Transmission Company has an adequate supply of natural gas committed to it which will enable it to render the service herein authorized" having explained (R. 5259-5260) :

The arguments that have been made as to the inadequacy of the Canadian gas supplies, while they

²⁷ The savings for El Paso were estimated at \$2,494,000 during the period 1966-1970.

would be relevant to a determination of whether a new pipeline should be built, are not appropriate where existing pipeline facilities will be utilized to make delivery of the gas. Even if the Canadian supplies were shown to be too small to justify the construction of a new pipeline, it would seem desirable to allow already existing facilities to be used to bring out whatever gas may be available. In addition we think that there has been no showing that the Canadian supplies are inadequate. We considered this question before authorizing the construction of these pipeline facilities. We then determined that the sources of supply were sufficient to justify construction of facilities which, with relatively little additional construction, would have capacity to carry all present and proposed gas imports. Nothing has been presented here which would persuade us that our prior determination was erroneous.

* * * *

The suggestion is made that the Canadian supplies may be cut off and are therefore unreliable. We think that the close relationship between the United States and Canada renders it unlikely that this sort of difficulty will arise. Also, this is an argument more properly advanced at the time of an application to construct new pipeline facilities. That a supply may be cut off in the future is not an argument against using existing facilities to bring out gas up to the time any cut-off occurs, although it may be an argument against investing in new facilities.

Also pertinent is the Examiner's discussion of the adequacy of the Canadian gas supply (R. 4908-4910), exceptions to which the Commission denied.

It is apparent that the Commission did not consider the question of gas supply irrelevant though it did believe that the contentions pressed on exceptions were not well taken in the context of a case where no new pipeline was to be built but rather only limited facilities were to be installed to take advantage of the cheap expansibility of an existing pipeline.

We now take up Texas' specific objection. First it argues (Texas Br. p. 9) that the record shows a physical insufficiency of natural gas because not all the wells ultimately required to *deliver* the committed reserves have been drilled. Texas argues that because additional wells will be needed in the future to achieve maximum deliverability from known reserves, the supply adequacy has not been shown. The need for such additional developmental wells to carry out long-term commitments exists in almost every case where large, new supplies are being attached. Texas' suggestion that the Commission should not issue any gas sales certificate until the producers have drilled every well that may eventually be needed is, we suggest, an astounding one and without any support. Neither of the producer groups of petitioners has joined in this contention.

Texas also makes the factual claim that this expansion should not have been approved because there is allegedly no showing that the Canadian producers could meet the peaking requirement, as opposed to the average daily requirement. In this respect Texas relies (Br. p. 9) on a statement (R. 206) by one of applicant's witnesses that he had made no computation as to the maximum deliverability of the wells used in making his deliverability study. But Texas neglects to recognize this was said in the context that these wells could deliver more than that shown on his study and that his schedule only showed deliverability to the extent needed, not the maximum capabilities above the amounts needed (R. 206). He also indicated that his study which showed the capability of the wells to deliver the annual requirements took into account the deviations in deliveries from the average daily amount (R. 210-218). The record also indicated that Alberta and Southern's gas purchases in Canada were usually fairly close to their average requirements (R. 342) and that Pacific Gas Transmission's maximum annual contract obligation is 365 times its daily contract demand (615,000 Mcf by November 1967), not 365 times

the maximum daily demand (665,000 Mcf by November 1967) (R. 4183).

It may also be noted that the 681,900 Mcf average daily requirement of Alberta and Southern (which purchases the gas for the importation) used for the first full year of the expansion was considerably in excess of the 665,000 Mcf average daily contract commitment of Alberta and Southern, though less than the maximum daily commitment of 720,000 Mcf (R. 4909). But maximum demands are not taken on a constant basis and could not be so taken contractually.²⁸ In view of these circumstances, it seems that the use of a total requirement of 681,900 Mcf per day was consistent with the over-all commitment of Alberta and Southern. Certainly, the Commission was free to so conclude and to reject the Texas objections to the Examiner's finding that there was an adequate gas supply.

The principal claim of Texas with respect to the inadequacy of the Canadian gas supply apparently is that the United States should not rely on gas supply from foreign sources because that supply might be cut off by the Canadian government sometime in the future (Texas Br. pp. 10-12). In support of its allegations as to the unreliability of Canadian supplies it points (Br. p. 11) to the action of the Canadian government with respect to a proposal by the Great Lakes Transmission Company to construct pipeline facilities through the United States. In that proceeding, requests for approval of the project were pending concurrently before the Federal Power Commission and the Canadian National Energy Board. Though the National Energy Board recommended approval for the proposal, the Canadian government, in exercising its normal review, initially did not consider the proposal within the interest of Canada. As Texas notes, the basic project has now received Canadian approval, though it is still pending before the Commission. That

²⁸ It was also testified that the committed reserves had increased above those shown by the studies used to support the application (e.g., R. 342-343).

case shows that an international project is closely scrutinized in Canada, as well as in the United States, before final long-range commitments are made. But the fact that the Canadian government, like the Federal Power Commission, might view a *proposed* project inconsistent with its own national interest (because it originally appeared to downgrade Canadian pipeline facilities), gives no support to the Texas fear that Canada might cavalierly cut off the gas supply for a project built and operated after *final* Canadian governmental approval, as here (R. 2417-2426). The Commission's belief (R. 5260) that "the close relationship between the United States and Canada renders it unlikely that this sort of difficulty will arise" is, we submit, a reasonable exercise of the judgment entrusted to it for determining whether to approve the import of natural gas.

Finally, contrary to petitioners' assertion, the Commission was fully warranted in treating as relevant the fact that the applications here did not involve the construction of an entirely new pipeline project but instead involved a relatively small capital investment permitting more efficient utilization of the existing pipeline with lower rates to PGT's customers. And if there were risks of a supply cut off, these exist not only with respect to the new service but also to the existing service approved in 1960. 24 FPC 134. The Commission approved the initial more expensive construction and importation by PGT with the realization that the project would render the most efficient service only after additional gas supplies were added. At this time the Commission should certainly be most reluctant to deny an expansion, which is shown to lower domestic rates by more efficient utilization of existing facilities, solely on the ground that imports are *per se* undesirable because of a latent possibility that the Canadian government might someday act unreasonably.

IV. The Contentions That the Commission Did Not Consider the Effects of the Approved Imports on the Domestic Economy Are Baseless

Texas (Br. pp. 37-39) and the amicus Independent Petroleum Association of America also contend that the Commission did not consider various effects of this importation on the domestic economy. This is not the case.

Most, though not all of the arguments advanced here, were also addressed to the Commission. After noting (R. 5259) that opponents of the increased importation "urge that as a matter of policy the importation of gas should be restricted" and that "[i]t is urged that the importation of natural gas has a depressing effect on the domestic industry, especially domestic exploration," the Commission expressed its position (R. 5260):

The Commission will consider carefully in every case the effect of importations of natural gas upon the domestic industry and upon the exploration and development which may be needed to develop future gas supplies. In the circumstances of the present case, where the need of the market for additional gas is established, where the basic facilities to procure the Canadian gas have already been constructed, where no competing application for transportation and sale from an alternative domestic source has been filed by any pipeline, and where there will be a reduction in unit cost of service which will benefit the consumers of four states, we think the benefits to be derived from granting these applications far exceed any alleged detriments to the domestic petroleum industry or its exploration and development program. * * *

The Commission thus recognized that one element in determining whether the importation of natural gas was consistent with the public interest requirements of Sections 3 and 7 of the Natural Gas Act, *infra*, pp. 32-34, was the effect on the domestic natural gas and petroleum industry. At the same time it viewed the advantages to the gas consumer from this importation to far outweigh

any such possible detriments. The Commission's view that this judgment must be determined on the facts of each case is certainly reasonable. Moreover, the balancing of competing interests is not susceptible to any mathematical measurement. In these circumstances, petitioners' arguments are no more than an attempt to have this Court substitute its judgment for that of the Commission—plainly not a judicial function.

Finally, we note the Texas argument (Br. pp. 38-39) that the effect of the importation upon the balance of payments situation should have been considered. This consideration was not urged upon the Commission in either the exceptions to the Examiner's decision nor in the applications for rehearing. Accordingly, the contention may not even be considered by this Court. See Section 19(b) and cases cited, *supra*, p. 20. Nevertheless, we wish to point out that the contention has no substance. In the first place, our balance of payments programs have carefully and deliberately avoided restrictions on imports. See Message from the President Relative to Review of International Balance of Payments and Our Gold Position—February 10, 1965, H.R. Doc. No. 83, 89th Cong., 1st Sess. p. 3; *Economic Report of the President* (January, 1966), pp. 13, 14. In addition, there is a balance of payments agreement with Canada which would render import restrictions futile. See, *e.g.*, Message from the President, *supra*, at p. 2. Under this agreement, if the United States cuts imports from Canada, Canadian exports are reduced and the Canadians get less foreign exchange reserves than they would have otherwise. This would then tend to enable Canadians to borrow more on our capital market (*i.e.*, United States investors could buy more long-term Canadian securities), and our balance of payments would be no better off than before.

CONCLUSION

For these reasons, the order of the Commission should be affirmed.

Respectfully submitted,

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*Federal Power Commission,
Washington, D. C. 20426.*

January 30, 1967

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PETER H. SCHIFF

Deputy Solicitor

APPENDIX

1. Pertinent provisions of the Natural Gas Act, 15 U.S.C. 717-717w, provide as follows:

SEC. 3. After six months from the date on which this act takes effect no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

* * * *

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural

gas when to do so would impair its ability to render adequate service to its customers.

* * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice

or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * *

SEC. 19 (b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for re-

hearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

2. The pertinent provision of the Regulations under the Natural Gas Act provides as follows:

Section 154.93, 18 C.F.R. 154.93, as amended, 31 Fed. Reg. 15485:

For the purpose of §§ 154.92 through 154.101 "rate schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission: *Provided*, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(a) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(b) Provisions that change a price to a specific amount at a definite date; and

(b-1) Provisions that permit a change in price to the applicable just and reasonable area ceiling rate which has been, or which may be, prescribed by the Commission for the quality of the gas involved; and

(c) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question:

Provided further, That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above shall be rejected.

3. The pertinent provision of the Commission's Rules of Practice and Procedure provides as follows:

Section 1.28(b), 18 C.F.R. 1.28(b) :

(b) *Offers of proof*. Any offer of proof made in connection with an objection taken to any ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall constitute the offer of proof.

FEB 28 1967

NO. 21313

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FOR THE NINTH CIRCUIT

THE STATE OF TEXAS,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

REPLY BRIEF FOR PETITIONER,
THE STATE OF TEXAS

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**REPLY BRIEF FOR PETITIONER,
THE STATE OF TEXAS**

I.

INTRODUCTION

The Petitioner, the State of Texas, has in its Initial Brief previously filed herein stated its position in opposition to the Commission's Opinion No. 495 and accompanying orders, together with the specific points and arguments in connection therewith, upon which it bases its opposition. This Petitioner firmly believes that such points and arguments have withstood the attacks of Respondent's and Respondent's Intervenors' arguments and therefore would continue to urge all of said points and arguments, as submitted in its Initial Brief.

The State of Texas incorporates by reference herein the statement of position found in its Initial Brief without change thereof.

The arguments made by the Commission and its supporting Intervenors were anticipated by and answered in the Initial Brief of the State of Texas. In reply to such parties, this Petitioner will therefore limit this brief to emphasis of the following matters.

II.

SUPPLEMENTAL ARGUMENTS

- A. The record on its face evidences that the incremental price of gas produced in Texas at the California border (Topock) is lower than even the original incremental price of PGT's proposed imported gas at the California border.**

The Initial Brief of the State of Texas on page 21 refers to the testimony of PGT's own witness that the price of "Texas" gas at the California border (Topock) is approximately 22¢ per Mcf, a lower price than the original incremental price of the imported gas proposed by PGT herein.

PGT, accompanied by the Commission staff and their several supporting Intervenors, have undertaken to explain away such pertinent part of the record by stating that such witness (Mr. Frank) was at such particular time using the term, "incremental cost," "in a different context than used elsewhere in the proceedings" (PGT brief, page 16), or that said witness "was not discussing the incremental cost of a new supply" (Commission brief, page 15), or that the witness meant to say that, since El Paso did present testimony in the *Transwestern Pipeline Company case*¹ that its

¹Transwestern Pipeline Company, et al., Opinion No. 500, — FPC— (1966) issued July 26, 1966.

incremental cost of delivering an additional 575,000 Mcfd—the 250,000 Mcfd basic application plus an additional 325,000 Mcfd—was 22¢ per Mcf, “El Paso’s overall total additional cost for delivery of these added volumes is 22¢ per Mcf” (Southern California Gas Company, et al, brief, page 14). Southern California Gas Company, et al, even have undertaken to arrive at an incremental cost to PGT of “Texas” gas of 27.47¢ per Mcf through a process which might be called computations assumed “arguendo” (Southern California Gas Company, et al, brief, page 15).

Notwithstanding the foregoing references and arguments in connection therewith, the fact remains and the record clearly reflects that Mr. Frank, witness for PGT, stated that “22¢ is approximately the border price at the California border” when discussing the incremental price of gas produced in Texas (R: 1219-1222).

In the Initial Brief of the State of Texas, references to PGT witness Frank’s testimony are sufficiently conclusive so as not to risk any misunderstanding by taking such statements out of context. The State of Texas does not know whether PGT witness Frank meant to say something else or failed to fully enlarge on what he had to say; however, this Petitioner does know what he in fact did say and submits that this case should be decided on what the record reflects and not on what parties on any one side of the controversy herein suggest the record should have reflected.

Moreover, El Paso’s witness Travis Petty, Assistant Comptroller of El Paso Natural Gas Company, in hearings before the Commission on October 7 through 9,

1964,² while testifying to the incremental cost of gas to be delivered by El Paso to the California border during the years 1968 through 1970, estimated such costs for the year 1968 to be 20.57¢ per Mcf for delivery of 250,000 Mcf per day and 22.66¢ per Mcf for delivery of 575,000 Mcf per day.³

Such estimates were based on firm gas rather than interruptables.

Such estimates are a part of the record in a prior hearing before the Commission.

If the Commission may in its expertise as Commission Staff implies (Commission brief, page 13-14), lift facts from the record of one hearing for the purpose of applying them to another hearing, then surely the foregoing estimates have been available for Commission scrutiny and edification for a considerable time. As reflected above, however, the estimates, of course, also appear as an exhibit to a filing in this proceeding.

The intention of the State of Texas was to examine the proposed witness, Barry Hunsaker, whom this Petitioner was not permitted to subpoena, in regard to price, as well as all other pertinent matters regarding a more desirable alternative source of natural gas, as to which, according to this Petitioner's understanding, such witness is expertly qualified.

Since the State of Texas was precluded from examining the proposed witness Hunsaker, as more fully

²Gulf Pacific Case Docket No. CP64-76, before the Federal Power Commission, Exhibit 125, Schedule No. 6, Sheet 1 of 1.

³Appendix to Initial Brief of State of Texas, Page 73, *El Paso Estimates of Cost of Gas Delivered to the California Border*.

discussed hereinbelow, the price of proposed "Texas" gas at the California border is noticeably disputed in this record, and a thorough comparison of the price of gas proposed for import by PGT and the price of gas proposed as a more desirable alternative by the State of Texas is virtually impossible.

The State of Texas submits that such a price comparison is relevant, is vital to a knowledgeable opinion consistent with the public interest, and will fully substantiate the price advantage to California consumers of this Petitioner's alternative proposal, the consideration of which has been consistently refused throughout the course of these proceedings within the Federal Power Commission.

The record is therefore lacking regarding material evidence of an alternate supply of gas at a possibly lower price than the price of Canadian gas proposed by PGT, and the Commission opinion was necessarily reached in disregard of such evidence.

Commissions Staff also appears to object to the Texas position as follows:

"... petitioners (Texas and TIPRO) also suggest that the domestic supplies would provide a better alternative because the producers' sales in Canada are not subject to F.P.C. regulation and particularly because many of the sales contracts permitted unlimited price renegotiations or re-determinations in 1968 and five year intervals thereafter.

"It is stated that, by contrast, gas sold in Texas is subject to Commission regulation 'in such a manner that its price is firm and definite in each field or area' (Texas Br. pp. 20-21). While the existence of indefinite price-changing provisions

in some of the Canadian contracts undoubtedly leaves an element of uncertainty as to future prices, it is also not possible to predict with certainty the prices that may be charged for Texas gas over the next twenty years." (Commission brief, page 21).

For the purposes of clarifying the foregoing matter and this Petitioner's position, we add that the Commission's regulations do permit, as Commission Staff indicates, periodic price increases under escalation provisions of contracts, but we emphasize that such increases can never go above the ceiling prices approved by the Commission. Therefore, under producer contracts covering domestic gas, a contrasting firm and reasonably known future price exists directly because of Commission regulations.

A tremendous difference exists regarding future prices under contracts for foreign gas. Under such contracts, no regulatory protection exists, and escalation clauses therein unquestionably introduce the element of uncertainty of future prices and therefore of future costs to consumers depending on foreign natural gas supplies covered by such unregulated contracts.

B. Although no competitive application was filed in this matter, the Commission should have nevertheless compared the PGT proposal with the desirability of the gas supply proposal of the State of Texas and, in that connection, should have admitted into the record relevant and material evidence of a presently available, more economic, alternate supply of gas, which the State of Texas undertook to propose for consideration.

A presently available, more economic and desirable,

alternate supply of natural gas produced in Texas was ignored by the Commission in reaching its opinion in this matter because the record before the Commission remained incomplete. The record remained incomplete because both the Presiding Examiner and the Federal Power Commission refused to permit the presentation of such evidence by this State.

To a large extent, the opposing parties to this case argue what the record might have shown or might have failed to show if the Hunsaker testimony had been admitted and if he had been subpoenaed for direct and cross-examination. Unfortunately, because of the erroneous refusal of the Commission to admit the Hunsaker testimony and to subpoena the proposed witness Hunsaker, as requested by the State of Texas, such argument of the parties hereto can be no more than surmise.

Moreover, the Commission concluded, after upholding the Presiding Examiner's exclusion of evidence of the alternate supply of gas proposed by the State of Texas, that the record does not show the existence of an alternate method of gas supply for consideration.

Therefore, first the Commission refused to let this Petitioner make such showing; then the Commission concluded there was no showing. In such a manner, these proceedings before the Commission were summarily brought to a close.

Southern California Gas Company, et al, concluded in their brief concerning the *City of Pittsburg Case*⁴

⁴*City of Pittsburg v. FPC*, 237 F.2d 471 (Cir.Ct.App., D.C., 1956).

and the *Scenic Hudson Case*⁵ that “. . . the Commission must scrutinize reasonable and feasible alternatives,” (Southern California Gas Company, et al, brief, page 11), with which conclusion the State of Texas completely agrees.

No party to this proceeding can argue conclusively concerning what Barry Hunsacker might have testified to under direct and cross-examination because the parties hereto were denied the benefit of his testimony by both the Presiding Examiner and the Commission. The State of Texas submits that, by the inclusion of his testimony, a reasonable and feasible alternative could have been developed and should have been considered by the Commission, as the law requires under the aforementioned and other pertinent cases cited in the Initial Brief of this State.

PGT, undertaking in its brief to summarize the meaning of the *City of Pittsburg* case,⁶ stated that “the Commission must not consider each application out of context with the known factors concerning the public interest in the situation before it” (PGT brief, page 23). It would probably be more accurate to say that the case stands for the proposition that the Commission must not consider each application out of context with the “knowable” factors concerning the public interest in the situation before it. And, that has been the consistent position of this Petitioner throughout these proceedings, to-wit: To make available to the Commission for its consideration a possibly more de-

⁵Scenic Hudson Preservation Conference, et al., v. FPC, 354 F.2d 605 (Cir.Ct.App., Second Cir., 1965).

⁶City of Pittsburg v. FPC (supra).

sirable alternate supply of natural gas available for Northern California.

PGT states that El Paso did not have a "proposed project in competition with that proposed by PGT," although it did have an "application pending for a project, on which hearings have been concluded, to serve another customer at a specified price" (PGT brief, page 23).

Now, we might note, that El Paso has another application pending before the FPC for a project to supply gas to California, a portion of which is actually proposed for Northern California, the very area which is the subject of this proceeding.⁷

However, notwithstanding the aforesaid statements in the PGT brief, consideration by the Commission of a more desirable means of supplying gas than the one applied for is not limited to those for which competing applications have been filed or actual projects have been proposed. To the contrary, the Commission has been amply directed by the courts to consider the existence of a more desirable alternative in order to determine whether a particular proposal does in fact serve the public convenience and necessity.⁸ "That the Commission has no authority to command the alternative does not mean that it cannot reject the (original) proposal." *City of Pittsburg v. FPC* (supra).

PGT further states that "the evidence offered by Texas did not show an alternative project, i.e., it left

⁷El Paso Natural Gas Company, Docket No. CP67-217, before the Federal Power Commission.

⁸Superior Oil Company v. FPC, 334 F.2d 1002 (Cir.Ct. App., Third Cir., 7-30-64).

out the important factor of *price*." As mentioned hereinabove, Texas intended from the inception of these proceedings to include the "important factor of *price*," together with all other pertinent matters, in its alternative proposal through examination of its proposed witness. Not only was the prepared testimony proposed by this Petitioner excluded by the Commission from the record but also the right of examination of the witness was denied. The State of Texas therefore was not even given the opportunity to be heard and present evidence, as procedural due process requires under established law. *Superior Oil Company v. FPC* (supra).

Since the disposal of this proceeding by the FPC, the Commission has apparently thought it necessary to give explicit consideration to all "alternate sources" of gas for any one project, as evidenced by a letter from the Commission Secretary directed to applicant in a subsequent proceeding filed by PGT seeking authority to import additional volumes of Canadian gas, wherein the Commission directly requested the following information:

"Lists of all alternate sources, together with studies and explanations associated therewith, which you have considered before deciding to import additional gas from Canada" (Appendix, page 1).

Such a letter was never mailed in the proceeding here under consideration.

Furthermore, in order to ascertain the position and *present* thinking of the Commission itself regarding consideration of alternate supplies of gas we quote excerpts from the Presiding Examiner's statements during the course of a proceeding, which is, at this writing, still pending before the Commission, and

which involve the question of whether the record should be reopened for the purpose of receiving evidence of a project containing the essential elements of an alternative described by the Commission Staff therein for the first time in the Staff brief, to-wit:

“Now, I do not understand, . . . , that the Commission or the examiner can brush off a proposal in a competitive proceeding in which, presumably, it is being asked to determine what is best in the public interest, on the ground of a deficiency in the evidentiary presentation.

“Mind you, as you very well observe, this is not presented in terms of asking that this proposal be certificated. This is being presented in terms of the argument that the proposals which the Commission has been asked to certificate do not represent the best proposal in the public interest.”

“I cannot ignore the fact that assuming in a competitive license or certificate proceeding the applicant proposes A and B, and it is determined that proposal C is the best proposal, the fact that it is not presented by the applicant does not relieve the Commission of its responsibility for denying A and B because the best public-interest proposal has not been presented.”

“The cases of Scenic Hudson and many other cases in which the courts have articulated a remand on the basis of the fact that the license proposals—that the record did not go into other proposals which were presented, we are all aware of this.”

“I recall decisions in which no one was presenting—was seeking an application for the proposal which the Commission or the courts later said should have been considered.” In the matter of Great Lakes Gas Transmission Company, et al.,

Docket No. CP66-110, et al., before the Federal Power Commission, (R: 3156, 3174, 3175 and 3176).

The Presiding Examiner in his statements set forth hereinabove was correct; and the State of Texas submits that he correctly reopened the record to develop evidence of the alternative proposal. The Commission has been admonished to "see to it that the record is complete;" and the Commission's duty has been recognized to affirmatively "inquire into and consider all relevant facts."⁹ These admonitions are somewhat more pointed and meaningful than the interpretation of the *Scenic Hudson* case by PGT that it was based upon "the same common sense broad principal that the Commission should not ignore important factors of the public interest of which it was aware." (PGT brief, page 24)

PGT also cites a 1957 *Michigan Consolidated Gas Company* case¹⁰ for support of its position arguing, in connection therewith, that the Commission properly rejected an alternative proposal (PGT brief, page 25). Again, the State of Texas reiterates that it is not here concerned with rejection or approval of a proposal; rather this State is concerned with and urges *consideration* of an alternate proposal by the Commission for the purpose of the Commission's reaching an educated and reliable decision of whether to approve or reject the application, which has been placed before it in this proceeding by PGT. We again emphasize a

⁹Scenic Hudson Preservation Conference, et al., v. FPC (*supra*).

¹⁰Michigan Consolidated Gas Company v. FPC, 246 F.2d 904 (Cir.Ct.App., Third Cir., 1957, cert. denied, 355 U.S. 894, 1957).

portion of the ruling in the 1960 *Michigan Consolidated Company* case as follows:

“... since the Commission is charged with the duty of protecting the ultimate consumer from ‘exploitation at the hands of natural gas companies’ (citing *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591, 64 S.Ct. 281, 88 L.ed. 333, 1944), it cannot refuse to *consider* a proposal which appears, on its face at least, consistent with that duty.” *Michigan Consolidated Gas Company v. Federal Power Commission*, 283 F.2d 204 (Cir.Ct.App., D.C., 4-29-60, reh. den. 7-11-60, cert. den. 364 U.S. 913, 1960).

In summary, although the present record indicates that the alternate proposal advocated for consideration by the State of Texas might be both more economic and more desirable, the State of Texas was denied the opportunity to make a full showing in the record of such alternative and was further denied the right to subpoena a witness for that purpose, who was never under this State’s control, and therefore consideration of such alternate proposal was totally ignored by the Commission in reaching its decision. As a result, all that the parties to this matter are presently able to do is to argue what the record might or might not have shown with reference to the alternate proposals of the State of Texas omitted from the record.

C. An “offer of proof,” to which the State of Texas was relegated in this proceeding before the FPC as a means of presenting its alternate proposal, is wholly inadequate and a virtually meaningless procedure that should not be tolerated by a court of law.

In this Petitioner's Initial Brief, the impossibility of the Commission to fully consider the significance of evidence under a mere "offer of proof" is argued because of an "offer of proof's" limited nature and incomplete coverage of what might have been relevant and material evidence. We repeat that no meaningful evidence is likely to be "tendered" through the means of an "offer of proof" because of a total lack of availability of cross-examination through such procedure (Initial Brief of the State of Texas, pages 6-7).

To such statements in this Petitioner's Initial Brief, the Commission staff replied as follows:

"The Texas argument that the Commission's consideration of evidence as submitted through offers of proof is insufficient to protect the party making the offer because there is no cross-examination is a startling theory. Plainly there is no valid objection if the Commission accepts proffered evidence at face value." (Commission brief, page 12).

In answer to the foregoing "Commission position" taken by staff and not at all for the purpose of startling staff further, we merely quote from the Presiding Examiner's remarks in the aforementioned proceeding presently pending before the Commission, wherein it appears that the Presiding Examiner is equally concerned with the results of a denial of the opportunity to cross-examine, to wit:

"As I read the Commission's order, it re-opened the record, at least to the limited extent of directing that the documents that were filed by Great Lakes subsequent to the close of the record be made a part of the record. Now, while these documents speak for themselves, they cannot be cross-examined, and their implications and significance

in terms of the public interest and the specifics as they relate to economic feasibility, it seems to me, can only be developed on cross-examination.

“Moreover, the other parties to this proceeding are entitled to answer or rebutt the conclusions of the Great Lakes associates and their interpretation of the significance of these documents insofar as they affect the merits of this proceeding.” In the matter of Great Lakes Gas Transmission Company, et al., Docket Nos. CP66-110, et al., before the Federal Power Commission, R: 3150.

Commission staff, in arguing that “offers of proof” are alone sufficient (without the availability of cross-examination and redirect) to protect the party making the “offer of proof,” relies on a *Natural Gas Pipe Line Company Case*¹¹ stating as follows:

“Plainly there is no valid objection if the Commission accepts proffered evidence at face value.” (Commission brief, page 12).

The Court, however, in the aforementioned case did not have before it an “offer of proof” for consideration; it had a question of evidence, as the following portion of the opinion reflects:

“All the evidence tendered was received and considered by the Commission, and before the interim order was entered counsel for the companies stated to the Commission that they had concluded the direct testimony in support of their case. So far as the order is supported by the evidence the companies cannot complain that they were denied a full hearing because they had not been able to examine on redirect their own witnesses who had not been cross-examined, or because they had no

¹¹Natural Gas Pipe Line Co., et al., v. FPC, 315 U.S. 575, 62 Sup.Ct. 736 (1942).

opportunity to cross-examine or rebut witnesses who were not offered by the Commission. The right to a full hearing before any tribunal does not include the right to challenge or rely on evidence not offered or considered." Natural Gas Pipe Line Co., et al. v. FPC (supra, page 584).

The State of Texas submits that the right to a full hearing before any tribunal *does* include the right to present relevant and material evidence and of an opportunity to cross-examine witnesses offered by a party thereto. We submit therefore that the foregoing case is not in point.

In addition to the necessity of full development of relevant and material evidence through making a witness available for cross-examination concerning proffered testimony, which, it seems to this Petitioner, should not even be disputed, the State of Texas was denied the right to have its proposed witness, Barry Hunsaker, subpoenaed to testify.

The witness Hunsaker was not and has never been under control of the State of Texas; the only manner by which this Petitioner could have questioned such witness was by use of the subpoena process, which was from the first denied this Petitioner; and any "offer of proof" or similar procedure under any name cannot be considered as even a poor substitute for subpoenaing a witness, as nothing could be offered thereunder and there could be no proof.

The "offer of proof," as used by the Commission in this matter, is a roughshod procedure, which lends itself to an unjust result.

The Federal Administrative Procedure Act is clear

in its provision for the right of a party to the use of the subpoena process, to-wit:

“Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought.” 5 U.S.C.A., Sec. 1005(c).

For the foregoing reasons, the State of Texas submits that such procedure as an “offer of proof” under the Commission’s Rules of Practice and Procedure denies to a party forced to use such procedure that procedural due process which by law and right any party should have before an administrative body such as the Federal Power Commission.

In this particular case, the “offers of proof” tendered by the State of Texas do not and cannot reflect any relevant and material evidence developed by examination of the witness Hunsaker. The only way to develop such evidence is to examine such witness. An “offer of proof” is no substitute. The record in this matter is therefore incomplete to the extent of the development of evidence through the examination of Barry Hunsaker, and this Petitioner has therefore been denied procedural due process through the refusal of the Commission to permit this State to examine Barry Hunsaker as a witness.

D. The record remains largely silent regarding a sufficiency of natural gas, upon which PGT would depend to meet its obligations under its application in this matter before the Commission.

Commission Staff has incorrectly stated this petitioner’s position in the following manner:

“We now take up Texas’ specific objection. First it argues (Texas Br. p. 9) that the record shows physical insufficiency of natural gas because not all the wells ultimately required to *deliver* the committed reserves have been drilled. Texas argues that because additional wells will be needed in the future to achieve maximum deliverability from known reserves, the supply adequacy has not been shown. The need for such additional developmental wells to carry out long-term commitments exists in almost every case where large, new supplies are being attached. Texas’ suggestion that the Commission should not issue any gas sales certificate until the producers have drilled every well that may eventually be needed is, we suggest, an astounding one and without any support.” (Commission brief, page 26)

This Petitioner’s position with reference to the supply upon which PGT would depend is set out in its Initial Brief on pages 9-13. Therein, we point out that according to the record approximately the same number of wells as are presently in existence will have to be drilled in some of the Canadian fields in order to produce the deliverability required to secure sufficient gas for the proposed expansion by PGT over the next 15 to 20 years (R. 198-200) and that some 153 additional wells will have to be drilled during such time (R. 206).

The arguments of this State do not, as Commission Staff states, embody the suggestion that “the Commission should not issue any gas sales certificate until the producers have drilled every well that may eventually be needed;” however, the State of Texas does suggest that the Commission should require, as indeed it does require with reference to domestic supply, evidence of a somewhat more definite and unquestionable nature

than the record herein reflects when only half of the necessary producing wells are presently in existence and where some 153 additional producing wells must be drilled in order to realize a sufficient supply to meet the requirements developed during Commission hearings.

The record here contains no real proof of reserves upon which PGT would depend; the record merely contains conclusions of PGT witnesses that the reserves are adequate.

The State of Texas submits that the record should be completed with evidence of adequacy of supply and that such evidence is, contrary to the view of the Commission in this proceeding (R: 5259), relevant and material.

III.

CONCLUSION

Wherefore, for the above reasons and all other reasons reflected in the Initial Brief of Petitioner previously filed herein, the State of Texas respectfully submits that this Honorable Court should set aside and hold for naught Commission Opinion No. 495 and accompanying orders and remand this matter to the Commission with appropriate instructions requiring admission of the aforementioned evidence proposed by the State of Texas and excluded by the Commission into the record for consideration and requiring the issuance of a subpoena duces tecum directed to Barry Hunsaker, as urged by the State of Texas, and/or in all things

deny the application of PGT herein as being inconsistent with and detrimental to the public interest.

Respectfully submitted,

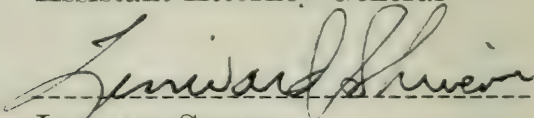
THE STATE OF TEXAS

CRAWFORD C. MARTIN
Attorney General of Texas

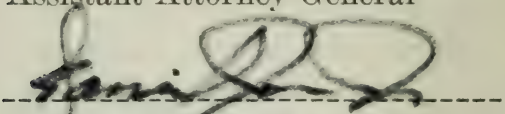
GEORGE M. COWDEN
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Assistant Attorney General




LINWARD SHIVERS
Assistant Attorney General



C. DANIEL JONES, JR.
Assistant Attorney General
Box "R," Capitol Station
Austin, Texas 78711

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



C. DANIEL JONES, JR.

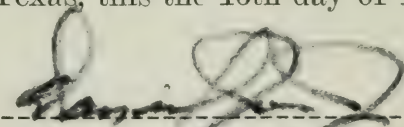
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing upon the following party:

Howard E. Wahrenbrock, Solicitor
441 G St. N.W.
Washington, D. C. 20426

and all other parties to this proceeding.

Dated at Austin, Texas, this the 16th day of February, 1967.



C. DANIEL JONES, JR.

APPENDIX

Copy of letter dated January 18, 1967 from Secretary, Federal Power Commission, to Pacific Gas Transmission Company in matter of Pacific Gas Transmission Company, Docket No. CP67-187, Before the Federal Power Commission.

FEDERAL POWER COMMISSION

Washington, D.C. 20426

In Reply Refer To:
BNG-PL/SW
Pacific Gas Transmission
Company
Docket No. CP67-187

Jan. 18, 1967

Pacific Gas Transmission Company
245 Market Street
San Francisco, California
94106

Gentlemen:

Your application in the subject docket to expand your pipeline system and to import additional gas from Canada should be supplemented by the submittal of the following information:

- (1) List of all alternate sources, together with studies and explanations associated therewith, which you have considered before deciding to import additional gas from Canada.
- (2) Breakdown of the increase in proven gas reserves between November 1, 1964 and November 1, 1966 by type of contract. This should be shown for each category as in Exhibit H (2), Page 1.
- (3) Explanation as to the source of peaking gas shown in the graph on Exhibit I (2) (b), Page 6.
- (4) Workpapers in support of Exhibit I.

The requested information should be submitted within 30 days from the date of this letter; otherwise, the

application would be subject to rejection under the provisions of Section 157.8 of the Regulations under the Natural Gas Act.

Very truly yours,

Secretary

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CALIFORNIA GAS PRODUCERS ASSOCIATION, INDEPENDENT OIL AND GAS PRODUCERS OF CALIFORNIA, JADE OIL AND GAS COMPANY; THE STATE OF TEXAS; TEXAS INDEPENDENT PRODUCERS & ROYALTY OWNERS ASSOCIATION, WEST CENTRAL TEXAS OIL AND GAS ASSOCIATION, and PERMIAN BASIN PETROLEUM ASSOCIATION, *Petitioners*

v.

FEDERAL POWER COMMISSION,
Respondent

PACIFIC GAS TRANSMISSION COMPANY; PUBLIC UTILITY COMMISSIONER OF OREGON; SOUTHERN CALIFORNIA GAS COMPANY, SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA and PACIFIC LIGHTING SERVICE AND SUPPLY COMPANY; CITY AND COUNTY OF SAN FRANCISCO, *Intervenors*

On Petition to Review Orders of the
Federal Power Commission

REPLY BRIEF OF PETITIONERS
TEXAS INDEPENDENT PRODUCERS &
ROYALTY OWNERS
ASSOCIATION, WEST CENTRAL TEXAS OIL
AND GAS ASSOCIATION,
AND PERMIAN BASIN PETROLEUM ASSOCIATION

JOHN DAVENPORT
902 International Life Building
Austin, Texas 78701
Attorney for above Petitioners

FILED

February 20, 1967

FEB 27 1967

FEB 29 1967

WM. B. LUCK, CLERK

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INTRODUCTION

As in their initial joint brief, Petitioners, The Texas Independent Producers and Royalty Owners Association (TIPRO), West Central Texas Oil and Gas Association (WCTOGA), and Permian Basin Petroleum Association (PBPA) will confine their arguments to those issues deemed most crucial to these Petitioners. In the initial brief these Petitioners demonstrated that the Commission denied them due process by refusing to allow Petitioners the opportunity to present testimony on the issue of a cheaper and more dependable alternative supply of natural gas for Northern California (TIPRO, et al, Brief p. 3-4, 6-9). These Petitioners also contended that since the Canadian producer contracts to supply the proposed importation of gas were "open ended," no price could be established as the cost of the imported quantities (TIPRO, et al, Brief p. 11-13).

The briefs of the opposing parties, including the Commission's brief, have been directed to their contention that the alternative source suggested by the Petitioners may have a higher price than the price these Petitioners assume. Very little of the opposing briefs is directed to the question of the likelihood — almost a certainty — that the Pacific Gas Transmission supply will far exceed its assumed price as a result of the open-ended nature of 86 percent of the volume supplied by indefinite Canadian producer contracts.

I.

THE BRIEFS OF RESPONDENT AND INTERVENORS DO NOT ANSWER PETITIONERS' CONTENTION THAT THE REFUSAL OF THE COMMISSION TO ISSUE THE REQUESTED SUBPOENA DENIED THEIR RIGHT TO A FULL AND FAIR HEARING.

The brief of the Commission totally fails to meet the argument of all of the Petitioners in this cause that the failure to issue a subpoena to the Pipeline Manager of El Paso Natural Gas Company precluded Petitioners from a full and fair hearing. The Commission brief dismisses this fundamental argument with a one sentence comment that "plainly there is no valid objection if the Commission accepts proffered evidence at face value" (Commission Brief, p. 12). The Commission did *not* accept the proffered evidence but excluded it and refused to subpoena the witness needed to determine if alternative service could be rendered by El Paso at a cheaper price and in a more dependable manner. This testimony was relevant and material, and the denial of the subpoena was prejudicial error since it deprived Petitioners of the right to a full and fair hearing. As pointed out in the brief of the City and County of San Francisco (p. 12) "the parties to the proceeding before an administrative agency such as the Commission are entitled to: First; Due notice as to the nature and scope of the contemplated inquiry; Second; An opportunity to be heard and present evidence; Third; A full hearing within conformity with the fundamental concept of fairness (Shell Oil Company v. Federal Power Commission, 334 F. 2d. 1002)."

Here the Commission denied Petitioners the opportunity to present relevant and material evidence and therefore

deprived them of the right to a full hearing within the fundamental concept of fairness.

All of the briefs of the opposing parties state that the Commission did not have enough evidence to consider El Paso as an alternative source (Commission Brief, p. 11; Southern California Gas Company, et al, Brief p. 17; Pacific Gas Transmission Brief, p. 20, 21), yet the objection of PGT and others led to the original exclusion of the proffered testimony and the denial of the request for a subpoena decus tecum. As pointed out more fully in our initial brief, *City of Pittsburgh v. Federal Power Commission*, 237 F. 2d 741, *Scenic Hudson Preservation Conference, et al v. Federal Power Commission*, 354 F. 2d 608, and *Michigan Consolidated Gas Company v. FPC*, 283 F. 2d 204, Cert. denied, 364 U.S. 913 (1960), require *at least* that the Commission allow a party to reasonably develop an alternative; and may require that the Commission itself develop the alternative, if the parties are unable to do so.

The Commission brief correctly points out (p. 18) "While the Commission has no power to require a pipeline to enlarge its facilities, we have no doubt that the aggressive companies serving the California market would take any reasonable opportunity to avail themselves of such an opportunity if the Commission indicated its preference for service by a different company." Similarly, Pacific Gas Transmission Company's brief is correct (p. 21 and 22) when it states "furthermore, the cited cases stand for the common sense principle that when there is an apparent possibility of injury to the public interest arising from the granting of the applications applied for, reasonable alternative proposals should be considered."

The forestalling by the Commission of Petitioners opportunity to present such an alternative was prejudicial er-

ror and requires the remand of this proceeding for further consideration by the Commission.

II.

ON THE PRESENT RECORD IT IS IMPOSSIBLE TO ESTABLISH THAT THE PROPOSED PACIFIC GAS TRANSMISSION IMPORTS ARE THE BEST, CHEAPEST, AND MOST DEPENDABLE SUPPLY AND REQUIRED BY THE PUBLIC CONVENIENCE AND NECESSITY.

The briefs of the Commission, PGT, and the Southern California Companies devote most of their argument to an attempt to establish at what price El Paso could deliver 200,000 Mcf per day to Pacific Gas and Electric. The brief of Southern California Gas Company, et al, states that by virtue of their (Southern Companies) "knowledge of the underlying facts they may be of aid to this Court" in determining the actual price of El Paso's deliveries (Southern Companies, et al, Brief, p. 3).

Their conclusion on this point was that the "range of incremental cost (from El Paso) is 25.7 cents and upward which is much higher than the incremental cost to PG&E of 22.6 to 23.6 cents per Mcf for the new PGT gas" (Southern Companies, et al, Brief p. 16). The Commission brief also reached a similar conclusion, stating "the difference in the total costs of the two supplies would be the incremental cost to PG&E of an additional 200,000 Mcf from El Paso, which is on an average basis of 25.7¢ per Mcf . . ." (Commission Brief, p. 15). On the other hand Pacific Gas Transmission Company contends that the El Paso gas will cost at least 27.75 cents per Mcf, stating "the cost to PG&E of additional volumes to El Paso is El Paso's "G" rate which as shown above is 29.74 cents

per Mcf but could possibly be reduced to about 27.75 cents per Mcf" (PGT Brief, p. 18).

These Petitioners contend that the evidence in the hearing below indicated that the incremental cost from El Paso was 22 cents, and quoted from PGT's own witness, who under cross-examination by El Paso stated the El Paso cost at the California border at Topock, was 22 cents per Mcf. The actual price can only be determined from El Paso witnesses.

It is significant that the staff of the Federal Power Commission who handled this case before the hearing examiner also reached the conclusion that El Paso gas is cheaper. The Commission staff brief on the initial submission to the hearing examiner quoted the same testimony of the Pacific Gas Transmission's witness and concluded (p. 38)

"It appears from the testimony of Pacific Gas' Witness Frank that El Paso Natural Gas Company's overall unit costs for gas delivered to California *have an edge* even over the incremental unit cost showing submitted in these proceedings by Pacific Gas with respect to its Canadian Gas under this proposal." (Emphasis added)

The cost to Pacific Gas & Electric of an El Paso increment is unknown. When El Paso's two best customers in California disagree on this price, these Petitioners and the Commission trial staff can hardly be blamed for accepting the testimony of the PGT witness at face value. The fact remains, however, that the best and only way to determine that price is to have the actual testimony of a live El Paso witness subject to cross-examination. This the Commission refused to allow.

Even if we did accept the estimate in the PGT brief that the incremental cost of an El Paso supply might be a mini-

mum of 27.75 cents per Mcf, this would not establish that the PGT supply is cheaper. The PGT figures for its supply are based on certain assumptions by Witness Blasdale, all aimed at favoring lower unit cost, and some of which have already proved erroneous.

Here again, the Commission staff counsel who handled this proceeding before the hearing examiner analyzed the incremental cost of the gas proposed to be delivered by PGT to PG&E. The Commission staff stated on original submission to the hearing examiner (Brief, p. 36, emphasis again added).

“In computing the unit cost of gas to be delivered at the Oregon-California Border to PG&E the witness Blasdale necessarily had to make certain assumptions. He assumed the following conditions:

“1. That there would remain a fixed rate of exchange of .925 American cents for each Canadian dollar; 2. *That there would be no increase in the price of purchased gas as a result of a price renegotiation under the gas purchase contracts;* 3. That there would be no new or increased Canadian taxes; 4. That no minor replacements or repairs would have to be made because of breakdown; 5. That Alberta and Southern would not have to pay for compression in connection with its purchases of gas in the Province of Alberta; 6. That the life of the project would not be further increased as a result of new export license for additional gas; 7. That labor and operational costs would remain at the same level through 1970; 8. That delivery by all the individual lines that are associated in this integrated project would be at a 100% load factor (Tr. 1313-1316).

“Most of the assumptions made by Mr. Blasdale in his unit cost of gas computations appear to be those that would favor lower unit costs.

“In the computation of these unit costs Mr. Blasdale was also able to take advantage of investment tax credit to the following extent:

“\$165,000 in the year 1967; \$321,000 in the year 1968; \$331,000 in the year 1969 and \$152,000 in 1970 (Tr. 1325).

“The availability of investment tax credit is also a factor depending on time and circumstance that can be utilized to reflect lower unit costs.”

The above illustrates that these Petitioners may have erred in relying on the 22 cent price for El Paso gas, but the suggested incremental PGT price of 22.6 to 23.6 is not precisely accurate either. The El Paso gas at 27.75 cents per Mcf may still be far cheaper during the life of the permanent certificate than the PGT gas, at a price which *no one can compute after July 1, 1968.*

As emphasized in our initial brief, over 86% of both the old and new gas received from PGT will be subject to an indefinite escalation clause providing for a complete unlimited renegotiation effective July 1, 1968. The initial staff brief states that as a result of the certification of this proposal 507,000 Mcf per day of the total 615,000 Mcf per day would be subject to indefinite escalation provisions (Staff Initial Brief, p. 32), and states “It also affords producers in the Province of Alberta selling into the American market certain advantageous privileges that his counterpart in the United States is unable to enjoy” (Staff Brief, p. 32).

The reasonable concern of the staff counsel in the administrative proceeding must be contrasted with the attitude expressed in the Commission Brief before this Court where it is said (Commission Brief, p. 22) “While the Commission could refuse to approve any project based on

contracts including any indefinite price changing provisions, this would be more restrictive contractually than the treatment of domestic producers.” This statement borders on absurdity, because it indicates the Commission may not take action to protect consumers for fear of slightly favoring United States producers.

The Commission’s brief in these proceedings states that domestic producers may renegotiate their contracts every five years, just as Canadian producers will do under the producer contracts in this case. In truth, however, any renegotiation by U.S. producers must remain below the area price previously established by the Commission. Canadian producers have no such limitations in the contracts before this Court.

The Commission staff counsel during the proceedings below recognized that the Canadian contracts would be held to be contrary to the public convenience and necessity in the United States, saying (Staff Initial Brief, p. 30):

“Hence, one troublesome issue arising from these proceeding relates to what, if anything, should be done because of the fact that approximately 50 percent of the reserves tendered in support of the additional volumes proposed to be imported from Canada are subject to what this Commission has categorized as indefinite escalation clauses that are contrary to the public convenience and necessity in the United States.”

The Witness Blair also testified to the fact that he is not aware of any ceiling or specific price that Alberta and Southern was limited to in connection with its purchase of gas because of activity of regulatory authorities in the Province of Alberta (R. p. 370).

The Commission brief filed with this Court states that the Commission considered the indefinite escalation pro-

visions and determined that "the contingency of unknown price increases sometime in the future was outweighed by the immediate savings to American consumers when the proposed sales commence" (Commission Brief, p. 22-23). The immediate savings mentioned will be short-lived however, because the unlimited renegotiation begins on July 1, 1968, and the permanent certification herein reviewed by this Court will extend to October 31, 1989. California consumers may rue the exchange of a year and a half of immediate savings at a cost of being bound for 21 years to whatever price Canadian producers choose to exact. The Commission brief also indicates that the Commission desired to preclude any evidence of El Paso's ability and willingness to serve this market, because El Paso would not be able to commence deliveries by November 1, 1966 (Commission Brief, p. 18). Here again, a delay of a few months might prevent the pushing of California consumers into a trap for 21 years of indefinite gas costs.

The Commission Brief (p. 11) chides TIPRO, et al, by saying "we suggest that TIPRO's argument that a market was not shown to exist is inconsistent with its basic position that Texas gas, rather than Canadian gas, should be used to meet PG&E's present market needs."

The basic position of TIPRO, et al, is that PG&E failed to establish that its present market needs are compelling enough to require immediate importation of the Canadian

supply. As pointed out in our initial brief, PGT's Witness Frank stated there would be no deficiency in peak day demands prior to 1968-1969 (R. 1162), even without the importation of this Canadian gas. He testified that the interruptible industrial requirement of PG&E had been satisfied 100% during 1963 and 1964, and 98% of PG&E's requirements for its own steam electric generating plants was satisfied in 1965, again without the Canadian importation (R. 1191).

If the desires of the interruptible customers, whether industrial or steam electric, are to be met without interruption, then there is an immediate market for the Canadian imports. We submit, however, that by interrupting service to the interruptible customers, PG&E could well wait to determine its source of new gas, at least until the outcome of the Canadian renegotiation sessions in July, 1968. If there is an immediate need for supplying this market, then the ability of the alternative supplies to meet this need can be immediately discovered on remand, if required witnesses can be subpoenaed.

CONCLUSION

It is submitted that Respondent has not met its obligation under the Natural Gas Act to determine if this application is required by the present and future public convenience and necessity.

These Petitioners respectfully submit that this Honorable Court should set aside Commission Opinion No. 495 and its accompanying orders, particularly including the order of December 17, 1965, and remand this matter to the Commission with instructions requiring admission of the evidence previously excluded and to determine if the facilities and importation proposed in such application are in the public interest and required by the present and future public convenience and necessity.

Respectfully submitted,
TEXAS INDEPENDENT PRODUCERS &
ROYALTY OWNERS ASSOCIATION
WEST CENTRAL TEXAS OIL AND
GAS ASSOCIATION
PERMIAN BASIN PETROLEUM
ASSOCIATION

By

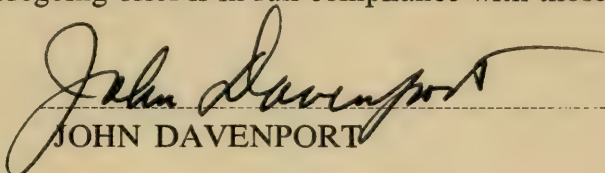

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February 20, 1967

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



JOHN DAVENPORT

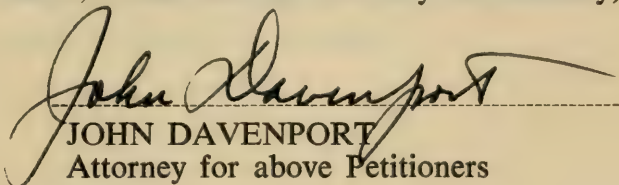
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing upon the following party:

Howard E. Wahrenbrock,
Solicitor
Federal Power Commission
441 G Street, N.W.
Washington, D.C. 20425

and all parties to the proceeding.

Dated at Austin, Texas this the 20th day of February, 1967.



JOHN DAVENPORT
Attorney for above Petitioners

MAR 7 1967

In the

United States Court of Appeals

For the Ninth Circuit

No. 21310

CALIFORNIA GAS PRODUCERS ASSOCIATION
INDEPENDENT OIL AND GAS PRODUCERS
OF CALIFORNIA

JADE OIL AND GAS COMPANY

Petitioners.

v.

FEDERAL POWER COMMISSION

Respondent.

On Petition to Review an Order of the
Federal Power Commission

Reply Brief on Behalf of
California Gas Producers Association,
Independent Oil and Gas Producers of California,
Jade Oil and Gas Company

FILED

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February 20, 1967

MAR 6 1967

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“C” 250 M²CF/D Proposal (Ex. No. 125)

“D” 575 M²CF/D Proposal (Ex. No. 128)

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**Reply Brief on Behalf of
California Gas Producers Association,
Independent Oil and Gas Producers of California,
Jade Oil and Gas Company**

QUESTIONS PRESENTED

As stated in their Initial Brief this case involves an appeal filed by the California Gas Producers Association, the Independent Oil and Gas Producers of California, and the Jade Oil and Gas Company ("California producers") for review of the orders issued by the Federal Power Commission ("FPC, Commission") authorizing a subsidiary of Pacific Gas & Electric Company ("PG&E")

to import a large volume of Canadian gas into northern California starting November 1966. (*Re Pacific Gas Transmission Company*, Docket No's. CP65-213, 214, 215).

The questions presented are:

1. In authorizing PG&E to import large volumes of Canadian gas into northern California starting in 1966 and 1967, can both PG&E and the FPC ignore completely the possibility of any new discoveries of natural gas in northern California after December 31, 1965 in determining whether a "market" exists in northern California for the newly authorized supplies of imported Canadian gas?
2. In authorizing PG&E to import large volumes of Canadian gas into northern California can the FPC refuse to receive and consider evidence showing the existence and availability of alternative supplies of natural gas from west Texas and New Mexico which could be delivered to the California border at a lower cost?

Throughout *this* proceeding before the FPC's Presiding Examiner, and before the FPC itself, and in the course of this appeal, the FPC and PG&E answered these two questions by saying "yes": All new discoveries of California produced gas may be ignored, and evidence of lower cost availability of alternative supplies of natural gas may be excluded and ignored — in determining whether to certificate new deliveries of out-of-state, or Canadian gas into California.

In every other recent case before the FPC itself, and the Courts, however, these questions have been answered "no". Thus, the FPC itself recognizes that new discoveries of locally produced (California) gas may *not* be ignored, and evidence of lower cost availability of alternative supplies of natural gas may *not* be excluded and ignored — in determining whether to certificate new

deliveries of out-of-state, or Canadian, gas into a new or expanding market.

This point-of-view has been repeatedly demonstrated by FPC and Court decisions in the *Transwestern (Gulf Pacific)*, *Rock Springs*, *Westcoast Transmission*, and *Great Lakes Transmission* cases, decided or under submission by the FPC during the last few years. It is supported by Court decisions in the *City of Pittsburgh* and *Consolidated Edison* cases. No case is cited to the contrary, saying that new discoveries of gas locally-produced gas can be ignored, or that evidence as to alternative means of delivering equivalent supplies at lower cost can be excluded.

In other words, the principles and policies upon which the FPC determines the "public convenience and necessity" apply to all of the FPC's *other* cases, but — for some reason or other — the FPC, PG&E, and the other parties supporting the FPC, argue that these principles and policies do not apply to this case.

I IN AUTHORIZING PG&E TO IMPORT LARGE VOLUMES OF CANADIAN GAS INTO NORTHERN CALIFORNIA STARTING IN 1966 AND 1967, CAN BOTH PG&E AND THE FPC IGNORE COMPLETELY THE POSSIBILITY OF ANY NEW DISCOVERIES OF NATURAL GAS IN NORTHERN CALIFORNIA AFTER DECEMBER 31, 1965, IN DETERMINING WHETHER A "MARKET" EXISTS IN NORTHERN CALIFORNIA FOR THE NEWLY AUTHORIZED SUPPLIES OF IMPORTED CANADIAN GAS?

In no place in the Answering Briefs filed on behalf of the FPC, PG&E, the Pacific Lighting Companies, the Oregon Public Utilities Commissioner, or the City and County of San Francisco is there any direct answer to this question presented by the California gas producers.

(a) Reply to Federal Power Commission

The FPC reviews the evidence submitted by PG&E asserting that the California producers "totally ignore" the fact that the record shows that even with the purchases certificated here, PG&E's requirements are such that it could absorb "much larger" gas supplies from California than it estimated would be available. Even if PG&E could purchase the same quantities of California gas in 1967, as it did in 1964, the FPC says that PG&E's total supply would *only* be increased by 103,000 Mcf, so that the total supply would still, on an average daily basis, be 138,000 Mcf less than the anticipated market potential. Under these circumstances, the FPC concludes that it had "no occasion" to address itself to the attack on PG&E's method for predicting available California gas supply. The California producers challenge of that method is thus dismissed by the FPC as "irrelevant" and "will not be discussed" (FPC Brief, pp. 29-30).

In reply, the California producers note that according to the FPC the amount of natural gas imports at issue is "only" 103,000 Mcf per day. If PG&E's estimated purchases of northern California dry gas were increased by 100,000 Mcf per day (even less than the 103,000 Mcf per day which the FPC suggests), this would be not only enough to provide for the maintenance of PG&E's purchases at the 1964 level (633,000 Mcf per day), but would be sufficient to defer for 1 year — from November 1, 1966 to November 1, 1967, PG&E's initial additional importation of 100,000 Mcf per day of Canadian gas. While the California producers challenge of PG&E's forecast methods may be "irrelevant" and unworthy of discussion by the FPC, it is a matter of vital and continuing importance to the California producers so that a continuing market for the present level of California gas production is to be assured.

In view of the FPC's specific approval of the use of trend estimates of future California gas production in the recent south-

ern California *Gulf Pacific* case, it is clear that the FPC does not condemn the use of such estimates in the present PG&E case (California Producers Brief, pp. 14-15). In its Brief to the Court here, the FPC merely apologizes for their omission in this proceeding, asserting that they are "irrelevant".

The California producers believe that such future gas supply estimates are "irrelevant" only if both PG&E and the FPC are justified in totally ignoring the possibility of any future new northern California gas discoveries and developments in scheduling the volume and timing of any additional imports of Canadian gas.

(b) Reply to Pacific Gas and Electric Company

Second, Pacific Gas and Electric Company says that if "no further California gas were discovered or developed, then the life index of existing reserves would drop to slightly less than seven years by the end of 1970. The discovery and development of this yet unknown reserve, PG&E asserts "cannot be relied upon", asserting that the history of discoveries in California is "sporadic". Nevertheless, PG&E asserts that the evidence shows that if reserves adequate to support the 1965 level of production should be discovered and offered for sale by the producers, PG&E "could" market the production, since PG&E would have a demand for gas "far in excess" of that which could be met by the additional 200,000 Mcf per day to be imported from Canada in this proceeding (PG&E Brief, pp. 29-30).

Significantly, while PG&E says that it "could" market such additional California gas production it refuses to estimate that there will be any new discoveries or developments of northern California gas supplies which should be considered in scheduling the volume and timing of its additional imports of Canadian gas.

In making these assertions, PG&E does not deny that its entire testimony as to the availability as to the future supplies of northern California proposed gas did not take into account any future projected, unconnected wells after December 31, 1965. If the present

level of California gas production were used, PG&E's proposed imports of Canadian gas, starting November 1, 1966 could be deferred for 1 year, to start November 1, 1967. What PG&E does say is that perhaps its estimate of future purchases of northern California produced gas (based on the unrealistic unassumption that there will be no future new discoveries or developments of California produced gas after 1965) is in error, but that the error is such that even if it were made, PG&E would still have a sufficient market to purchase supplies of northern California produced gas far in excess of its estimates.

The short answer to this is if PG&E believes on a realistic basis that there will be *any* new discoveries or developments of northern California dry gas after the end of December 31, 1965, it is incumbent upon PG&E to present that evidence to the FPC and to the parties in this proceeding so that a "realistic" rather than an "unrealistic" basis may be presented for determining the required volume and timing of any additional imports of Canadian gas. Certainly, if PG&E can present such estimates in other proceedings (in the Permian Basin Area Rate case, or before the Alberta Oil and Gas Conservation Board), it can do so here.

(c) Reply to Pacific Lighting Companies

Third, the Pacific Lighting Companies wisely refrain from *any comment at all* on this question since the sworn testimony of their gas supply witness, and the FPC's final opinion, in the *Gulf Pacific* proceedings, indicates clearly that in estimating the available supply of California produced gas in southern California the "total supply" available in 1965 was trended to obtain the estimated volumes for subsequent years in order "*to reflect both normal decline in production and the addition of new sources of gas*" (*Re Transwestern Pipeline Company, et. al.*, Opinion No. 500, p. 22) (*California Producers Brief*, p. 12).

The difference between PG&E and the Pacific Lighting Companies is that while Pacific Lighting Companies estimate *no reduction at all* in their California produced gas supply in *southern* California from 1965 to 1970, PG&E forecasts a reduction from 628,000 Mcf per day in 1964 to 328,200 Mcf per day in 1970 in *northern* California — a reduction of nearly 50%. The difference is that while Pacific Lighting's estimates of future purchases of California produced gas purchase levels have been very close to these forecasts, PG&E's estimates have been completely unreliable — amounting to less than 40% of the California produced gas which actually became available (California Producers Brief p. 18).

(d) Reply to City and County of San Francisco

Fourth, the City and County of San Francisco applaud PG &E's estimated cut-backs in its future purchases of northern California gas, saying that evidence was presented to show that in the interests of consumers of northern California "it is necessary to preserve the gas fields as long as possible in order to meet future peak periods", asserting that the California producers have not established they are "ready, willing and able" to undertake on any firm contract basis to supply the needs of PG&E in the future. San Francisco goes on to argue at great length that the price which the California producers are receiving for their gas from PG&E is up to 11¢ per Mcf higher than the cost of Canadian gas (San Francisco Brief, pp. 4-8).

Contrary to San Francisco's statement, no evidence of any kind was presented (and San Francisco makes no record reference) to indicate any necessity to preserve the northern California gas fields "as long as possible" in order to meet future peak periods. The California gas producers have indicated that they are "ready, willing, and able" to contract to deliver a supply of California gas at the present level for at least three years in the future, particularly if PG&E were willing to offer them any such contract

(Fazio, R. 1363; California Producers Brief on Exceptions, pp. 34-40; R. 5063-5069). In addition, the California producers pointed out at length in their Briefs, both before the Presiding Examiner and the FPC itself, that taking into account the cost and value of the required peaking characteristics imposed upon deliveries of California dry gas (not imposed upon deliveries of Canadian gas) the cost of California produced gas was actually less — rather than up to 11¢ more — than the cost of Canadian gas (California Producers Brief on Exceptions, pp. 31-34; R. 5060-5063).¹

In sum, the comments of the City and County of San Francisco do not meet the issue posed by the California producers in this appeal:

In authorizing PG&E to import large volumes of Canadian gas into northern California starting in 1966 and 1967, can both PG&E and the FPC ignore completely the possibility of any new discoveries of natural gas in northern California after December 31, 1965, in determining whether a “market” exists in northern California for the newly authorized supplies of imported Canadian gas?

(e) Position of the California Gas Producers

Ever since the arrival of the first deliveries of PG&E's new supplies of Canadian gas in December 1961, the California gas

1 As the City and County of San Francisco knows, there is no basis for stating that PG&E's supplies of northern California gas are more expensive than additional supplies of Canadian gas. Compared to the practically continuous (90%-100% load factor) deliveries of Canadian gas, PG&E's purchases of northern California gas are made at less than a 50% load factor, requiring 3 to 1, 4 to 1, and up to 5 to 1 peak day — compared to average — deliveries. Since these “peaking characteristics” are, themselves, valued at 11.65¢ - 12.10¢ per Mcf (based on the alternative cost of making such deliveries from PG&E's underground storage fields) the incremental cost of the additional Canadian gas supplies, and the cost of California produced gas purchases are about the same (California Producers Brief on Exceptions, pp. 31 - 34; R. 5060 - 5063). While this issue was discussed by the Presiding Examiner in his initial Decision (p. 20; R. 4921) it was never raised nor referred to by the FPC in its final decision (R. 5254 - 5263). San Francisco's statements in this respect are therefore deliberately misleading.

producers have had a difficult time in marketing their gas supplies to PG&E, the monopoly purchaser of gas in northern California.

In 1961 PG&E purchased 75,000 Mcf per day over the minimum contract purchase volumes stated in PG&E's gas purchase contracts. After the advent of PG&E's first new deliveries of Canadian gas in December 1961, no further purchases over the minimum contract requirements have been made — a loss of over \$8 million, or nearly 15% in sales. In contrast to PG&E's interest and willingness to promptly negotiate purchases of new California gas supplies, together with a willingness to attach these new contracted-for supplies to its system in 1961 and prior years, during 1962-1964, and now 1965 and 1966, PG&E has been notably slow in contracting for, and then attaching, new supplies of northern California dry gas to its existing system.

Today, the northern California dry gas producer is faced with what is undoubtedly the most restrictive gas purchase contract in the United States — calling for deliveries of up to 5 times (500%) as much gas for peak-day use as PG&E agrees to purchase on the average, a contract term sharply more restrictive and demanding than the 10%-20% peaking provision found in PG&E's Canadian contracts, and many times the typical 30% peaking provision found in gas purchase contracts in west Texas and New Mexico. In addition to this he is faced with selling his production, if at all, to a monopoly buyer who admittedly purchases over 95% of the natural gas produced in northern California.

Added to this, the northern California gas producer receives less in the way of line extension allowances to attach his gas to PG&E's system than is available elsewhere — in southern California. Furthermore, in the absence of take-or-pay-for clauses (which PG&E has to date generally refused to insert in its gas purchase contracts) the loss attributable to PG&E's delays have fallen squarely on the northern California gas producer.

While there may have been some justification for these difficulties in marketing supplies of northern California produced gas when the first deliveries of PG&E's Canadian gas were made (a certain minimum volume being required in order to commence pipeline operations) no such justification exists for increasing the capacity of the Canadian pipeline, and importing additional supplies of Canadian gas based solely on unrealistic PG&E estimates which completely disregard and ignore any possible new discoveries or developments of northern California gas production.

As long as PG&E continues to estimate sharp declines in its future purchases of California produced gas — employing a completely “unrealistic” assumption of no further northern California discoveries or developments — these difficulties in marketing supplies of California produced gas will also continue. Only if PG&E is required to make a “realistic” forecast of northern California dry gas production (as the FPC has approved for southern California) will the northern California gas producer have any official indication that *any* market exists for any new discoveries and development of new northern California dry gas fields.

As the California producers have shown (Brief, p. 6) and as the FPC has admitted (FPC Brief, p. 10) the adoption of the current continued level for PG&E's prospective purchases of California produced gas in 1967 would increase the indicated supply by over 103,000 Mcf per day — with an even greater amount for later years. Such an additional amount would be more than enough to warrant deferment of PG&E's purchases of additional supplies of Canadian gas from November 1, 1966 to November 1, 1967, or later. The error is, therefore, one of substantial magnitude.

On this basis alone, the California gas producers ask that the FPC decision in these proceedings be set aside and new hearings ordered in the light of the FPC's failure to consider PG&E's unsupported estimated “cut-backs” of California produced gas in order to provide a market for additional deliveries of Cana-

dian gas. Certainly, no estimates based on the wholly unrealistic assumption that there will be *no new discoveries or development of dry gas in northern California after December 31, 1965* can be used as a basis for FPC certification and approval of additional Canadian imports under the "public interest" standards of the Natural Gas Act.

II IN AUTHORIZING PG&E TO IMPORT LARGE VOLUMES OF CANADIAN GAS INTO NORTHERN CALIFORNIA CAN THE FPC REFUSE TO RECEIVE AND CONSIDER EVIDENCE SHOWING THE EXISTENCE AND AVAILABILITY OF ALTERNATIVE SUPPLIES OF NATURAL GAS FROM WEST TEXAS AND NEW MEXICO WHICH COULD BE DELIVERED TO THE CALIFORNIA BORDER LOWER COST?

A) The FPC, PG&E, and the Pacific Lighting Companies Are Mistaken in Believing that the FPC "Correctly" or "Properly" Concluded That Evidence of Possible Alternative Means of Delivering El Paso Gas to PG&E Should Have Been Excluded From Consideration.

Each of the parties supporting the FPC's issuance to PG&E of a certificate to import the additional supplies of Canadian gas argues, in effect, that while it is appropriate as a matter of general law to receive and consider evidence showing the existence and availability of alternative supplies of lower cost gas, it was not appropriate for the FPC to require such evidence "in this case". In order to justify the exclusion of such evidence in this case, the parties assert that:

- 1) The FPC "reasonably concluded" that no alternate supply was available at better prices (FPC Brief, pp. 11-21);
- 2) The "record does not demonstrate" that alternative methods exist for providing the needed volumes . . .

at rates and under conditions "more advantageous (PG&E Brief, pp. 19-26);

- 3) The FPC considered the State of Texas proposal "on the merits" but found the benefits from the PG&E applications more "in the public interest" (Pacific Lighting Brief, pp. 11-20);
- 4) The FPC "correctly excluded" the testimony and exhibits tending to show the existence of such alternative means and there was "no violation of due process" (San Francisco Brief, pp. 8-13).

The basis upon which each of the parties argues that the Presiding Examiner and the FPC itself was justified in excluding the proposed testimony and exhibits is, in effect, that even if the evidence had been admitted, it would not have proved what the State of Texas, TIPRO, IPAA, and the California gas producers assert that it would have proved.

Thus, the parties individually state:

- 1) The incremental cost to PG&E for El Paso gas under the Hunsaker testimony would be "higher" and the California producer claims of other alternatives are "totally misconceived" (FPC Brief, pp. 13-21).
- 2) The arguments of Texas, TIPRO, and the California gas producers as to the price at which El Paso gas was available to PG&E are "misleading" (PG&E Brief, pp. 15-19);
- 3) PG&E's incremental costs for the instant Pacific Gas Transmission Canadian gas supplies were substantially lower than the delivered cost of El Paso gas, and while El Paso's present available capacity is interruptible, PG&E's consumers required firm capacity (Pacific Lighting Brief, pp. 14-19);

- 4) No alternates have been shown, nor would be inclusion of the proffered testimony add "anything of a material nature" (San Francisco Brief, p. 11).

The question, therefore, comes down to what the proposed, or proffered evidence (testimony and exhibits) would have shown if it had been admitted as part of the record in these proceedings.

There is, in fact, no question but that the evidence sought to be introduced and made a matter of record in the proceedings before the FPC would have shown the existence and availability of alternative supplies of natural gas from west Texas and New Mexico which could be delivered to the California border at a lower cost.

First, for the purposes of a point of reference, the testimony introduced by PG&E in this proceeding showed that the delivered cost of its supply of Canadian gas at the California border would be: (Presiding Examiner's Decision, p. 15; R. 4916):

	Average Cost Including Addi- tional Volumes (¢ per Mcf)	Incremental Cost of The Additional Volumes (¢ per Mcf)
1967	31.04¢	—
1968	30.73¢	22.60¢
1969	30.91¢	23.36¢
1970	30.83¢	23.60¢

The question is whether the testimony and exhibits sought to be introduced by the State of Texas, TIPRO, IPAA, and the California gas producers would have shown that the delivered cost of El Paso gas to PG&E at the California border in equivalent volumes and similar conditions of proposed service would have been lower.

B) In Contrast to the Position Taken, and the "Calculations" Made by the FPC, PG&E, and the Pacific Lighting Companies, On Both an Average Cost, and in Incremental Cost Basis, the Delivered Cost of Additional Supplies of El Paso Gas under Similar Conditions of Service Would Be Lower Than the Cost of PG&E's Proposed Additional Canadian Imports

This question is easily resolved. On both an average cost, and an incremental cost basis, the delivered cost of additional supplies of equivalent El Paso gas under similar conditions of service would have been lower.

On an *average cost* basis, all of the parties submitting any delivered cost data show that the average delivered cost of El Paso gas would be lower than the average delivered cost of PG&E's Canadian gas. Thus, taking into account the probable forthcoming reductions in the cost of El Paso's gas resulting from the certification of new deliveries to southern California, the "flow-through" of lower Federal and State income tax costs resulting from liberalized depreciation, and the lower natural gas field purchase costs resulting from the FPC's recent Permian Basin Area Rate decision, the delivered cost of equivalent supplies of El Paso gas under similar conditions of proposed service would be 27.75¢-27.00¢ per Mcf.¹

FPC - "as low as an average of 27.00¢ per
Mcf (FPC Brief, p. 15, fn. 14)

PG&E - "could possibly be reduced to about
27.75¢ per Mcf (PG&E Brief, p. 18)

PACIFIC LIGHTING - "assuming . . . all . . . reduction . . .
at the maximum amounts . . . 27.25¢ per Mcf
(Pacific Lighting Brief, p. 16).

¹ As a practical demonstration of this lowered delivered cost of El Paso gas, on January 26, 1967 this Court may take official notice of the fact that El Paso filed a rate reduction of 0.94¢ per Mcf (about 1¢ per Mcf) applicable to its deliveries of natural gas to PG&E, reducing the delivered price at the California border to 28.90¢ per Mcf (14.73 psia). Further delivered price reductions are expected. (*Re El Paso Natural Gas Company*, Docket No. RP67-9, Notice issued January 31, 1967, 32 FR 2589).

Since the average cost of PG&E supplies of Canadian gas at the California border is 30.73¢ - 31.04¢ per Mcf (above), it is clear that on an "average cost" basis the supplies of El Paso gas would be available at a lower cost.

The same comparison is equally true on an "incremental cost" basis.

The proposed testimony and exhibits sought to be made part of the record by the State of Texas, TIPRO, IPAA, and the California gas producers show that the additional required natural gas transmission pipeline construction by El Paso would have been \$50,442,000 (Hunsaker, Ex. No. 56, Tr. 1518; R. 2932). This would have been sufficient to deliver, not 200,000 Mcf per day as sought by PG&E, but 250,000 Mcf per day — or 25% additional. No question has been raised by any party that this larger supply of gas would have been of the same "firm" character (and, in fact, of a slightly higher heat content) of the Canadian gas sought to be imported by PG&E.

The incremental cost of this gas is also a matter of record in these proceedings. In a letter sent by the President of PG&E to the President of Westcoast Transmission (a possible competing Canadian supplier) PG&E's policy witness in these proceedings (Mr. J. S. Moulton) prepared a Memorandum setting forth the "comparative Cost of Additional Out-of-State Gas" which was attached to the letter. During Mr. Moulton's cross-examination, this letter was made a matter of evidence in the FPC proceedings over the objections of PG&E's counsel and was finally admitted only as an "offer of proof" not further considered either by the Presiding Examiner, or by the FPC, itself (R. 1758-60). As set forth in Mr. Moulton's Memorandum, the incremental cost of deliveries of 250,000 Mcf per day of El Paso gas to PG&E at the California border at different load factors (L.F.) were (Moulton, Ex. No. 64; R. 3057-3061):

EL PASO ESTIMATES OF COST OF GAS DELIVERED TO THE CALIFORNIA BORDER

Incremental Costs (a)

	Project			
	250 M ² /Day		575 M ² /Day	
	L.F.	Cost/Mcf¢	L.F.	Cost/Mcf¢
1968	91.66	20.57	95.0	22.66
1969	94.74	20.69	95.0	23.01
1970	96.3	20.05	95.0	22.69
Average 14.9¢ base	94.9	20.43		22.79
Average 14.73¢ base		20.2		22.53

Note: (a) I.N.G.A. Bulletin of November 1964 digest of Travis Petty testimony in El Paso et al F.P.C. hearings October 7-9, 1964.

J.S.M.

1/20/65

Clearly these incremental costs, for an additional supply of 250,000 Mcf per day (250 M²/Day) 20.2¢ per Mcf on the average, are nearly 2½¢ - 3½¢ per Mcf less than the incremental delivered costs of 22.60¢ - 23.60¢ per Mcf for PG&E's proposed new supplies of Canadian gas. Even the higher average 1968-1970 22.53¢ per Mcf incremental costs of an additional supply of 325,000 Mcf per day (totalling 575 M²/Day) are less than the 22.60¢ - 23.60¢ per Mcf for PG&E's proposed supplies of Canadian gas. Since, however, El Paso's delivered price is subject to a reduction of 2¢-2½¢ per Mcf (assuming a 1¢ per Mcf reduction in purchased gas resulting from the Permian Basin Area Rate case, and an additional 1¢ per Mcf to reflect recently authorized increased delivery volumes and the "flow-through" of liberalized depreciation) the final incremental cost of even the larger volume of El Paso deliveries would still be 2½¢ - 3½¢ per Mcf less than the 22.60¢ - 23.60¢ per Mcf incremental costs for PG&E's proposed new supplies of Canadian gas.

Thus, on all counts, volume and type of service, and on both an average and incremental cost basis, the evidence sought to be made a matter of record in these proceedings by the State of Texas, TIPRO, IPAA, and the California gas producers would have shown the existence and availability of alternative supplies of natural gas from west Texas and New Mexico which could be delivered to the California border at a lower cost than PG&E's proposed importation of additional supplies of Canadian gas.¹

In contrast to this, the FPC, and Pacific Lighting arrive (after a page or two of detailed explanation) at an "incremental cost" of 25.7¢ per Mcf (FPC Brief, p. 14; Pacific Lighting Brief, pp. 1-16) — or about 4¢ per Mcf more than the incremental cost of 22.6¢ - 23.6¢ per Mcf for PG&E's Canadian gas. Needless to say none of these calculations, suggestions, or computations were ever made a matter of record during the course of the proceedings — but instead were "manufactured" out of thin air for the first time in the FPC and Pacific Lighting Answering Briefs. Even if these theories, and calculations, were correct — which they are not — the record in these proceedings should be reopened to have them presented and tested on cross-examination.

Pacific Lighting also makes a comparison, stating that the total capital cost of PG&E's proposed 200,000 Mcf per day Canadian

¹ PG&E policy witness Moulton's Memorandum showing "El Paso Estimates of Cost of Gas Delivered to the California Border" (Ex. No. 64; R. 3057-3061) refers to INGAA Bulletin of November 1964 digest of Travis Petty testimony in *El Paso et. al.* (Gulf Pacific) hearings, October 7-9, 1964. (Mr. Travis Petty is Controller of El Paso Natural Gas Company). Mr. Petty's testimony, referred to by PG&E policy witness Moulton, takes the \$50,442,000 and \$77,810,000 capital costs of the El Paso facilities — estimated by El Paso witness Barry Hunsaker — required to deliver an additional 250,000 and 325,000 Mcf per day of firm natural gas to the California border and translates that capital cost into El Paso's incremental costs of about 20.2¢ - 22.53¢ per Mcf for gas delivered to either PG&E or the Pacific Lighting Companies at the same point on the California border (A copy of the excerpt of the INGAA (Independent Natural Gas Association of America) Bulletin No. 974 (November 19, 1964) referred to by PG&E policy witness Moulton, and the underlying exhibits of Travis Petty, El Paso's Controller, showing the derivation of the 20.2¢ per Mcf incremental delivered prices are attached as Appendices "A", "B", "C" and "D" to this Reply Brief).

project is \$24,974,000 (or \$125 per Mcf of daily capacity added), compared to \$50,442,000 (or \$200 Mcf per day of daily capacity added) for El Paso's 250,000 Mcf per day alternate deliveries (Pacific Lighting Brief, pp. 16-17). However, this difference in capital costs is more than offset by the higher field cost of PG & E's Canadian gas, and the higher rate of return (7½% vs. 6½%) earned on PG&E's Canadian facilities — so that the delivered cost of El Paso's gas at the California border is less on both an average and incremental cost basis.¹

Only the FPC discusses the possible application of these 20½¢-22½¢ per Mcf incremental delivered costs of an additional 250,000 Mcf per day of El Paso gas (FPC Brief, p. 17), suggesting that the benefits of this low cost El Paso incremental expansion would have to be shared with the Pacific Lighting Companies — instead of redounding solely to PG&E's benefit. The answer to this, as the FPC finally concedes in a footnote (FPC Brief, p. 17, fn. 20) is that "concededly, if a new purchase does precipitate overall lower costs it is reasonable to assume that all the reduced costs to *that* purchaser should be attributed to the new purchase". The FPC then argues that there is "absolutely no basis" for treating a seller's incremental cost as reflecting the purchaser's incremental cost when the cost savings are distributed among a number of purchasers.

In addition, a good deal of argument is made by the FPC, PG&E, and Pacific Lighting saying that the "other alternatives" are "totally misconceived" (FPC Brief, pp. 19-20), or that deliver-

¹ Pacific Lighting also alleges (without reference to any record data) that it is "clear" that the cost of bringing El Paso gas from Topock on the Arizona border to the San Francisco Bay area load center exceeded the "minimal" cost for transporting the same amount of gas from Canadian sources at the Oregon border to the same load center. Suffice it to say that on December 23, 1966 PG&E Board Chairman Gerdes announced that PG&E's compressor station at Hinkley in the Mojave Desert and at Kettleman in Kings County — on the Topock, Arizona to Milpitas (San Francisco) line — were scheduled for enlargement in 1967 in order to transport "still another" 100,000 Mcf per day from El Paso's sources of supply from fields in west Texas and New Mexico to PG&E's load center in the San Francisco Bay area.

ies of "firm" and "best effort" gas are persistently confuse(d)" (PG&E Brief, pp. 17-20), or that El Paso's available capacity is "interruptible" while PG&E consumers require "firm" capacity (Pacific Lighting Brief, pp. 18-19). Needless to say that no investigation of these issues was possible since the Presiding Examiner, and the FPC itself, refused to issue the necessary subpoenas to compel the attendance of El Paso witnesses by which any such conflicting claims could be made a matter of record, and tested by cross-examination, or rebuttal.

But all of this is a matter of argument based on matters which should have, but were not, made a matter of record before the Presiding Examiner and the FPC itself to be tested on cross-examination, made the subject of possible rebuttal testimony, and then considered by the FPC itself in making its final determination. This course of action, however, was precluded by PG&E's vigorous argument to exclude any such evidence, testimony and exhibits, affirmed by the Presiding Examiner's ruling, and the FPC's final action affirming the exclusion of the evidence which would have shown the existence and availability of these alternate means of supply.

The California gas producers, here, do not ask that the welter of conflicting claims as to the availability of alternative means of delivering equivalent supplies of natural gas from west Texas and New Mexico under similar conditions at lower prices be examined and determined by this Court. It is sufficient to show that the evidence exists, that it was sought, over objections, to be made a matter of record by the State of Texas, TIPRO, IPAA, and the California gas producers, and that the proposed evidence was excluded first by the FPC's Presiding Examiner, and then by the FPC itself. On this basis the certificate erroneously issued by the FPC should be set aside and the case remanded to the FPC with directions that the evidence as to possible alternative means sought to be presented by the State of Texas, TIPRO, IPAA, and

the California gas producers should be received and considered by the FPC before arriving at its final decision in the proceedings.

C) In Every Instance the Court Decisions Cited by the Parties Require the Presentation, and Consideration, by the FPC of Evidence Indicating the Existence of Alternative Means of Providing the Required Supplies of Natural Gas Before the Issuance of a Certificate.

In answering the questions posed by the State of Texas, TIPRO, IPAA and the California gas producers concerning the necessity of investigating the possible alternative means of providing the gas supplies to PG&E from domestic rather than Canadian sources, only two parties, PG&E and the City and County of San Francisco, even refer to the *City of Pittsburgh* and *Consolidated Edison (Scenic Hudson Preservation Conference)* cases cited as requiring the production, investigation, and analysis of such evidence. At that, only PG&E makes a serious attempt at analyzing the cases to determine the applicability to the present situation. As far as the FPC, Pacific Lighting, or the Oregon Public Utilities Commissioner are concerned, it is as though the cases did not exist.

Certainly, ignoring the landmark cases, cited by the State of Texas, TIPRO, IPAA, and the California gas producers does not make them inapplicable.

The City and County of San Francisco admits that the *City of Pittsburgh* case does indicate that "all alternative means (to supply gas" should be considered. However, San Francisco argues that "here", "no alternates have been shown", nor San Francisco adds would the inclusion of the profered testimony add anything "of a material nature" (San Francisco Brief, p. 11). The short reply to this is that the only reason "no alternates have been shown" is that the State of Texas, TIPRO, IPAA, and the California gas producers were prevented from making such a showing by the action of the Presiding Examiner and the FPC itself in this case — an action which San Francisco supported on the record in the FPC proceedings. Contrary to San Francisco's statements,

it may fairly be said that inclusion of the proffered testimony would have added something of a “material nature” — showing clearly that for comparable volumes of gas delivered under similar circumstances the cost of delivering alternative supplies of El Paso gas from west Texas and New Mexico to the California border would be lower than the costs of making such deliveries of additional gas to the California border from Canadian sources as proposed by PG&E.

Again, PG&E makes the argument, after referring to the *City of Pittsburgh* and *Consolidated Edison* cases, that “these cases do not apply to the circumstances of this case”, since there was “no demonstration” that alternative methods exist for providing the needed volumes of additional gas at rates and under conditions more advantageous than proposed by PG&E. PG&E, too, forgets that the only reason that such a showing was not made on the record (although it was made the subject of an offer of proof) was that based on PG&E’s strenuous objections, both the Presiding Examiner and the FPC itself excluded this evidence from the record, and refused to consider it in any way in reaching the FPC’s final decision to certificate and approve PG&E’s proposed additional new imports of Canadian gas.

The State of Texas, TIPRO, IPAA, and the California gas producers ask such an opportunity now. They are entitled to just such an opportunity under the Natural Gas Act if the “public interest” is to be served.¹

¹ PG&E also suggests that under the doctrine of the *City of Pittsburgh* case it would only be appropriate for the case to be remanded to the FPC where during the pendency of the appeal the pipeline company involved (in that case Texas Eastern, and in this case El Paso) filed an application with the FPC for authority to expand its capacity. Exactly that has been done in this case. On January 31, 1967 El Paso filed a certificate application with the FPC to increase its deliveries of natural gas to PG&E by 100,000 Mcf per day on a firm basis (Docket No. CP67-217). Thus, the precise conditions which PG&E would have used as a stumbling block have, in fact, been complied with. El Paso has accordingly abandoned its “neutral” position (enforced upon it by PG&E) during the course of the FPC proceedings, and is now “ready, willing, and able” to make the required alternative deliveries if certificated (32 FR 2913-4).

III IN CONTRAST TO THE POSITION TAKEN HERE, THE FPC STAFF, THE CALIFORNIA PUBLIC UTILITIES COMMISSION, AND THE STATE OF OREGON, ALL SUPPORTED A VIGOROUS INVESTIGATION OF POSSIBLE "ALTERNATIVES" IN THE RECENT WESTCOAST TRANSMISSION CANADIAN IMPORTATION CASE

In this case, first the Presiding Examiner, then later the FPC itself excluded any evidence, sought to be produced and introduced as a matter of record, covering the possible "alternative means" of delivering an equivalent of lower cost supplies of domestically produced New Mexico gas from west Texas and to PG&E's northern California market by El Paso Natural Gas Company. The Presiding Examiner's ruling in this regard was supported by the State of Oregon (Public Utility Commissioner) and the California Public Utilities Commission. While the FPC Staff did not oppose the introduction of this "alternative means" evidence FPC Staff counsel showed no interest in investigating the "public interest" in investigating the possibilities of certificating any different lower cost domestic natural gas supplies.

This attitude of indifference on the one hand (by FPC Staff and Staff Counsel), and positive opposition on the other (by the Oregon Public Utility Commissioner and the California Public Utilities Commission), may be contrasted with the attitude of these self-same parties a year later, September 1966, when the same issue of importing an equally large volume of Canadian natural gas supplies this time into the Pacific Northwest area, but at the same price as proposed by PG&E here was presented to the FPC for determination. (*Re El Paso Natural Gas Company*, Docket Nos. G-8932, CP66-315).

In contrast to its position of shutting off any consideration of alternative means in the proceedings here, on November 28, 1966 in the Westcoast Transmission proceedings, FPC Staff counsel filed a 65 page Brief taking the position that to permit the proposed

El Paso - Westcoast Transmission purchase at the "discriminatory" rates proposed would be "unconscionable". Thus the FPC Staff recommended denial of the El Paso - Westcoast Transmission project "without prejudice" to El Paso amending its application to "reflect" a new contract containing lower firm long-term rates from Westcoast Transmission or, in the alternative, to propose a new "looping" program to bring natural gas to Pacific Northwest market from southwestern (San Juan Basin) or Rocky Mountain sources.

According to the FPC Staff the "basic question" presented to the FPC for decision in the *Westcoast Transmission* case is:

Is it in the public interest, at this time, to permit the importation of substantial additional quantities of gas from Westcoast under a long-term contract which incorporates a high and increasing cost, not subject to any control by the Commission, or should the Commission require that El Paso consider other means to meet the long-term needs of its Pacific Northwest customers, which other means may have a short-term detrimental effect but overall long-term benefits?"

How different this is from the position of FPC Counsel to the Court here where every possible argument is being suggested in order to relieve the FPC from even considering the very question which FPC Staff Counsel considered "basic" to the Westcoast Transmission Canadian import proceeding involving the same issues.

The position of the Oregon Public Utility Commission is also in sharp contrast. Throughout the proceedings in this case before the FPC, the Oregon Public Utility Commission supported the exclusion of the evidence sought to be introduced by the State of Texas, TIPRO, and the California gas producers as to possible "alternative means" of supplying the PG&E markets from lower cost domestic sources. Oregon's intervention in the Court proceedings also supports the FPC action in certificating PG&E's

new Canadian imports without making any "alternative means" inquiry.

How different this is from the position which the Oregon Public Utility Commissioner took only three months ago in the *Westcoast Transmission* proceeding when the question of supplying Oregon's own markets with Canadian gas supplies (at the same delivered "border price") was concerned. There, in a 12-page Brief filed on November 28, 1966 by the same parties intervening in these Court proceedings (Robert Y. Thornton, Attorney General; Richard W. Sabin, John H. Socolofsky, Assistant Attorneys General, Salem, Oregon) the Oregon Commission states that the "primary issues" in this matter so far as Oregon is concerned are:

- "1. Are the terms of the present contract, the best terms available under which needed volumes can be supplied?
- "2. What will the effect of the contract upon the Pacific Northwest be in the long run?
- "3. Are there more reasonable alternatives?"

Only after detailed examination of these "reasonable alternatives" does Oregon feel "compelled" to recommend approval of El Paso's *Westcoast Transmission* Canadian import request — a sharp contrast with Oregon's position in these proceedings where it recommended and supported shutting off any consideration of such "reasonable alternatives" testimony.

The self-same situation applies to the California Public Utilities Commission.

Throughout the proceedings before the FPC in the present PG&E Canadian import proceedings now on appeal before this Court, the California Public Utilities Commission supported the exclusion of all evidence sought to be presented by the State of Texas, TIPRO, and the California gas producers as to the availability of alternative supplies of natural gas from domestic sources

in west Texas and New Mexico, which could be delivered by El Paso Natural Gas Company to the California border at a lower price than the additional Canadian imports for which the FPC has given PG&E approval here. The situation, however, is sharply different when the same counsel for the California Public Utilities Commission (Mary Moran Pajalich, Chief Counsel; J. Calvin Simpson, Principal Counsel, and Sheldon Rosenthal, Senior Counsel) appear in the *El Paso - Westcoast Transmission* Canadian import proceedings.

In the *El Paso - Westcoast Transmission* FPC proceedings less than three months ago, the California Commission says it "believes that there are alternate sources of supply capable of satisfying this need which will better meet the public convenience and necessity of El Paso's Northwest and Southern Division customers."

The California Commission says that during the course of the *Westcoast Transmission* proceeding, it became apparent that two other sources for obtaining the required 200,000 Mcf per day of additional supplies of gas were available to El Paso's Northwest Division: El Paso's Ignacio plant in the San Juan Basin; and, the abandonment of El Paso's present sale to Colorado Interstate in the Rocky Mountain area. Because of the additional facilities required for deliveries of gas from these alternative sources, the incremental cost of these additional supplies of domestic gas to the El Paso's Northwest Division appear to be at "least equal to" and "possibly slightly greater" than the cost of any "quantity under El Paso's proposal" before the FPC.

"Although comparative economics must play a major role in the determination of public convenience and necessity, the first-year costs of various alternatives are not the sole criteria. The Federal Power Commission (Commission) must consider the future effect of a proposal on such matters as *additional sources of supply* and the price thereof beyond the

existing application, system-wide flexibility of the purchasing pipeline to meet demands in all its service area, and stimulation of producer exploration and development of new gas resources." (Emphasis supplied).

Under these circumstances, the California Commission urged the FPC to deny El Paso's application in the Westcoast Transmission proceeding and "encourage" El Paso to file a new application which would contemplate expansion into the existing Northwest Division facilities to permit transportation of gas from the San Juan Basin and the Rocky Mountain area to the Pacific Northwest load centers.

Perhaps it is the California Commission's embarrassment at its completely inconsistent position in the two parallel Canadian import proceedings before the FPC which prevents it from supporting its position on appeal from the FPC proceedings here.

In this regard, the inconsistency of the FPC's own position in the Westcoast Transmission Canadian import proceedings, and its position before the Court here are equally apparent. Instead of arguing in support of the exclusion of such "alternative means" testimony, as the FPC does here, in the *El Paso - Westcoast Transmission* Canadian import proceeding, the FPC specifically stated in advance of opening the hearings that the issues to be covered included (*Re El Paso Natural Gas Company*, Docket No's. G-8932, CP66-315, order issued June 24, 1966):

- "(1) Are there alternative means available to meet the needs of the Northwest customers which would be more preferable than the proposal herein?
- "(2) Is there a market at this time for the volumes of gas proposed to be sold and transported by El Paso?
- "(3) Is it in the public interest to permit El Paso to import the additional volumes of natural gas at the price proposed to be charged by Westcoast Transmission Company?

- “(4) What will be the rate effect of the proposal herein?”
- “(5) Should a domestic pipeline rely upon Canadian reserves to the degree that is herein proposed or should restrictions be placed upon the importation of natural gas, in light of the facts in this case?”

How different this expressed point-of-view is from the FPC position in these parallel proceedings where FPC Counsel argues in support of the exclusion of evidence which would have provided and exposition of these self-same issues!

Certainly any position taken by the parties to the proceedings on appeal to the Court here must be considered in the light of their completely inconsistent positions, (in support of the position taken by the State of Texas, TIPRO, and the California gas producers) taken in the even more recent *El Paso - Westcoast Transmission* Canadian import proceedings.

IV THE IMPACT ON PG&E OF THE TEMPORARY LOSS OF THE PRESENTLY CERTIFICATED ADDITIONAL CANADIAN GAS SUPPLIES WOULD BE MINIMAL, AND WOULD EASILY BE OFFSET BY ADDITIONAL PURCHASES OF CALIFORNIA PRODUCED GAS OR GAS FROM WEST TEXAS AND NEW MEXICO SOURCES.

In its Answering Brief in these proceedings PG&E indicates that one of the reasons why the Federal Power Commission's decision approving PG&E's additional purchases of Canadian gas should be upheld is the impact on PG&E's northern California gas distribution system in the event that these supplies of Canadian gas were temporarily or permanently lost.

The fact of the matter is that the loss of these additional FPC-approved purchases of Canadian gas would not have *any effect at all* on PG&E's deliveries of natural gas on cold winter design peak days until the winter of 1968 - 69 at the earliest. As far as day-in and day-out average annual purchases are concerned,

PG&E's additional Canadian gas purchases amount to less than 5% - 10% of PG&E's total annual gas supply from all sources, and any loss can readily be made up by additional purchases of California produced gas, or additional deliveries by El Paso Natural Gas Company of gas from west Texas and New Mexico sources.

In addition, it is clear that, if, on the average PG&E's natural gas deliveries in northern California were to be curtailed by 5% - 10%, *no natural gas consumer of PG&E's in northern California would be remotely affected*. The only impact would be that PG&E's low-priority steam-electric generating plants (which presently consume over 30% of PG&E total gas supply) would have to burn residual fuel oil, which is in plentiful supply. Not only are there no restrictions on the burning of this substitute fuel, but large supplies are readily available at the present equivalent price of PG&E's present gas supplies. Furthermore, all of PG&E's steam-electric generating plants, including those at Pittsburg and Antioch on the Sacramento River, are equipped to switch to burning residual fuel oil at the turn of a switch (Frank, R. 1185; Moulton, R. 1626).

A) PG&E Does Not Need the Additional Supplies of Canadian Gas In Order to Meet PG&E's PEAK-DAY Requirements Before the Winter of 1968 - 69.

Based on PG&E's own data of record, PG&E does not need the additional supplies of Canadian gas in order to meet PG&E's cold *peak day* requirements before the Winter of 1968 - 69.

Thus, PG&E's market requirement witness Frank stated that without the applied for Canadian gas, supply deficiencies begin only in the winter season of 1968-69, two years after the present *date PG&E proposes receiving initial deliveries under its applications to the Commission* (R. 1114). While Mr. Frank's direct testimony (served on the parties May 24, 1965) originally claimed that the additional supplies of Canadian gas were required to

remedy peak day supply deficiencies in the winter of 1967 - 68, this was amended prior to presentation (September 23, 1965) to withdraw the original claim, and require the additional supplies for such peak day purpose requirements a year later, for the winter of 1968 - 69 (Frank, R. 1107).

Even on PG&E's unsupported forecast of a sharply declining peak day supply of California gas, PG&E has an excess of available peak day supply over peak day requirements through the winter of 1967 - 68 without the importation of the additional proposed 200,000 Mcf per day sought to be imported from Canada (Ex. No. 18, page 10, last column, R. 2403; R. 1116; Ex. No. 17, page 8, line 12; R. 2391):

PEAK DAY SUPPLY AND REQUIREMENTS (Mcf per Day)

Forecast	Excess With Proposed Canadian Supplies	Canadian Supplies	Excess Without Proposed Canadian Supplies
1965 - 66	294,000	211,000	83,000
1966 - 67	367,000	211,000	156,000
1967 - 68	253,000	211,000	42,000

In making this comparison, not only is additional "operating tolerance" of 70-72,000 Mcf per day included, but 56-69,000 Mcf per day of interruptible load "not promptly curtailable" is also included. (Ex. No. 18, p. 10, R. 2403).

If instead of PG&E's artificially reduced indicated peak day availability of 1,321,000 Mcf per day for northern California gas, the present peak day supply level of 1,562,400 Mcf of gas actually physically available were used, an additional "margin" of over 250,000 Mcf per day of peak day California gas would be available (Haavik, Ex. No. 17, p. 8, line 3; R. 2391).

Based on the testimony of PG&E's own market witness, and the supporting data submitted by PG&E itself, therefore, no justification exists for PG&E to import the additional proposed supplies of Canadian gas to meet *peak day* requirements before the winter of 1968 - 69, *at least two years beyond the November 1, 1966 initial delivery date proposed here by PG&E.*

B) PG&E's Additional Volumes of Canadian Gas Certificated by the FPC Amount to Only 5% - 10% of PG&E's Total Gas Supply.

In order to put the FPC's certification of PG&E's additional Canadian gas supply into perspective, it is necessary to compare the additional Canadian gas supply applied for by PG&E, and approved by the FPC, with PG&E's total average annual gas supply available from all sources.

On this basis the average annual additional Canadian gas supply to PG&E amounts to about 5% (5.4%) for the first year (1967) and less than 10% (9.3%) in total in the second year (1968).

ANNUAL GAS REQUIREMENTS

1967	Annual (Bcf)	Average (Mcf per day)	% of Total
California Gas	191.836	528,000	25.1%
El Paso gas	375.278	1,027,000	49.1%
Canadian gas			
Present (1965)	152.132	418,000	19.9%
Applied For	41.613	114,000	5.4%
Total Canadian	193.745	532,000	25.3%
Total All Gas	764.931*	2,087,000*	100.0%*
1968			
California gas	165.520	453,000	21.6%
El Paso gas	375.577	1,029,000	48.7%
Canadian gas			
Present (1965)	152.132	418,000	19.9%
Applied For	72.116	197,000	9.3%
Total Canadian	224.248	615,000	28.2%
Total All Gas	769.323*	2,197,000*	100.0%*

* Note: Totals also include minor underground storage withdrawals (about ½%).

Source: Frank, Ex. No. 18, p. 2 (R. 2395)

C) PG&E Has Readily Available More Than Enough Additional Supplies of California Produced Gas, and Gas From El Paso Sources, to Make Up the Loss of the Additional Canadian Gas Certificated by the FPC.

The fact of the matter is that PG&E has readily available more than enough additional supplies of California produced gas, and gas from El Paso sources, to make up for the loss of 100,000 Mcf per day in 1967 and 200,000 Mcf per day in 1968 of additional Canadian gas erroneously certificated by the FPC.

a) Additional Northern California Gas Supplies.

Compared to PG&E's estimates, it is clear that additional supplies of northern California dry gas will, in fact be available. These additional northern California dry gas supplies at the present level of northern California gas deliveries amount to approximately the 100,000 - 200,000 Mcf per day of additional Canadian gas imports certificated erroneously by the FPC.

Thus, if northern California dry gas deliveries are merely maintained at their present 1963-64 delivery level (instead of being sharply cut, as proposed by PG&E), the additional gas supplies required by PG&E will be available:

**CALIFORNIA PRODUCED GAS
(Average Daily Amount)**

<u>Average (Mcf) per Day</u>	<u>PG&E Estimated Supply</u>	<u>Additional Available Supply</u>
Actual:		
1963	632,000	—
1964	628,000	4,000
Estimated:		
1965	608,200	23,800
1966	604,200	27,800
1967	525,600	106,400
1968	453,500	178,500

It is only PG&E's blind refusal to admit the existence of these additional northern California gas supplies, which have

actually resulted from new discoveries and developments in northern California since December 31, 1965 that prevents these additional available supplies — at PG&E's own "back door" — from being taken into account. Once *any* account is taken of even the possibility of any such new northern California gas discoveries, developments and supplies, it is evident that PG&E has the additional California gas supplies which it requires "for the mere asking." These additional California gas supplies, at the present level of northern California dry gas production, are sufficient, for all practical purposes, to meet the deficiency in PG&E's stated overall gas requirements.

b) Additional El Paso Gas Supplies.

In addition to additional supplies of northern California dry gas, PG&E also has available additional supplies of gas from El Paso from west Texas and New Mexico sources. Again, this additional supply is enough to meet at least half, if not more, of any PG&E loss of 100,000-200,000 Mcf per day of certificated Canadian gas supplies.

In PG&E's gas supply estimates presented to the FPC, PG&E included 1,025,000 Mcf per day from El Paso, PG&E's presently certificated firm daily quantity. As stated in the California gas producers Initial Brief (pp. 25-26) this is considerably less than the actual maximum level of deliveries of El Paso's gas to PG&E over existing El Paso, and PG&E facilities.

In order to make certain that these additional supplies of El Paso gas will in fact be available to PG&E during the coming year, PG&E within the last few months has entered into a new contract with El Paso to receive an additional quantity of 36,500,000 Mcf of natural gas. On a 365 day year, this is exactly equal to on the average 100,000 Mcf per day — or precisely half of the additional gas supply which PG&E would otherwise purchase from Canada. The cost of this additional El Paso gas to PG&E

at the California border is about 21½¢ per Mcf, or up to 3¢ per Mcf *less expensive* than even incremental supplies of Canadian gas delivered by PG&E's affiliate pipeline, also at the California border. (Rate Schedule No. G-X-2; Item D; R. 3098)

This Court can take official, or judicial, notice of the availability of these additional El Paso supplies, and particularly the statement in the FPC's official order, of December 13, 1966, that El Paso will make these additional deliveries "through maximum utilization of its presently certificated pipeline facilities at the existing point of interconnection" between El Paso and PG&E at the California border, and that "no additional pipeline facilities are proposed or required to be constructed" by El Paso in order for El Paso to make the additional natural gas deliveries to PG&E (*Re El Paso Natural Gas Company*, Docket No. CP67-51, order issued December 13, 1966).¹

Summary

In sum, it is clear that PG&E has readily available more than enough additional supplies of California produced gas, and gas from El Paso sources to make up for the loss of 100,000 Mcf per day in 1967 and 200,000 Mcf per day in 1968 of additional Canadian gas erroneously certificated by the FPC, and these supplies are presently available to PG&E without further regulatory action of any kind.

D) No Consumer of Natural Gas in California Would Be Even Remotely Affected By Any 5% - 10% Curtailment in PG&E's Supplies of Natural Gas.

Even if PG&E were to lose 100,000 Mcf per day of gas in 1967, and 200,000 Mcf of gas in 1968, from Canadian sources, and this gas could not be made up with alternate supplies of gas

¹ On December 22, 1966 PG&E's Chairman of the Board stated in a press-release that PG&E was enlarging its compressor stations at Hinkley in the Mojave Desert, and at Kettleman in Kings County in order to make this additional 100,000 Mcf per day of gas available from El Paso.

from other sources, *no consumer of natural gas in California would even be remotely affected* by such a 5%-10% curtailment in PG&E overall supplies.

The only effect would be that PG&E's low priority steam-electric generating stations would have to turn to the burning of residual fuel oil instead of natural gas. Not only is this residual fuel oil in plentiful supply, but there are no restrictions on its burning at these locations, and large supplies are readily available at the present equivalent price of PG&E's present gas supplies. Furthermore all of PG&E's steam-electric generating plants, including those at Pittsburgh and Antioch on the Sacramento River, are equiped to burn residual fuel oil, instead of natural gas, at the turn of a switch.

a) PG&E's Estimated Firm Natural Gas Requirements

At the outset, it may be noted that — because of the loss of a large resale customer (the Pacific Lighting Companies in southern California) PG&E's firm requirments for natural gas are in fact actually less in 1968 than they are in 1966:

**ESTIMATED FIRM
NATURAL GAS REQUIREMENTS**

	Annual (Bcf)	Average (Mcf per Day)
1966	347.045	951,000
1967	331.314	908,000
1968	345.669	947,000

Source: Frank, No. 18, p. 2 (R. 2395)

More important, however, is recognition that out of PG&E's total natural gas requirements, less than 40% (or only 908,000 Mcf per day out of a total of 2,294,000 Mcf per day) is required for deliveries to the over 2,000,000 firm residential, commercial, and industrial customers throughout PG&E's northern California service area.

b) PG&E's Estimated Interruptible Natural Gas Requirements

Next, approximately 1700 industrial users consume nearly 30% (or 666,000 Mcf per day) of PG&E's total gas supply under uniform contract conditions which provide only for "interruptible" supplies of natural gas. Each of these large interruptible industrial customers is required, by California Public Utilities Commission order, to have available alternate supplies of fuel (usually residual fuel oil, or fuel oil of lighter quality) available to burn at all times.

Last, in order of priority (and first to be curtailed) are PG&E's deliveries to its own steam-electric generating plants, including the large plants at Moss Landing and Antioch on the Sacramento River (Frank, R. 1198). In 1967 these deliveries are estimated to amount to over 720,000 Mcf per day, and constitute over 31.5% of PG&E total gas requirements.

SUMMARY OF PG&E NATURAL GAS REQUIREMENTS

1967	No. of Customers	Annual (Bcf)	Average (Mcf per day)	% of Total
Firm Requirements	2,076,984	331.314	908,000	39.5%
Interruptible:				
Industrial	1,690	242.892	665,000	29.0%
PG&E Plants	—	263.184	721,000	31.5%
Total	2,078,674	837.390	2,294,000	100.0%

Source: Frank, Ex. No. 18, pp. 2, 3 (R. 2395-6)

In view of the fact that a loss of 100,000-200,000 Mcf per day in PG&E's Canadian supplies amounts to only 14%-28% of PG&E's own consumption of low priority natural gas in PG&E's own steam-electric generating plants, it is clear that even with such a loss, no other supplies would be affected. This is particularly true since PG&E's own witness stated that the additional supplies of Canadian gas were not needed to meet peak-day delivery requirements until the winter of 1968-69 (Frank, R. 1114).

Accordingly, if PG&E were to lose the additional 100,000-200,000 Mcf per day of Canadian gas which it has applied for in the FPC proceedings, *no individual PG&E customer would be remotely affected*. The only effect might be that PG&E would have to burn residual fuel oil rather than natural gas in its own steam-electric generating plants (particularly the Pittsburgh and Antioch plants on the Sacramento River).

Since there are no restrictions on such burning, and since alternate supplies of residual fuel oil are in oversupply and are in fact readily available (Jordan, R. 1580) and since PG&E's steam-electric generating plants are all equipped to use residual fuel oil (Frank, R. 1185; Moulton, R. 1626) the *only* impact of the loss of the additional supplies of Canadian gas — even if no alternative supplies of natural gas from domestic sources were available — would be to require PG&E to consume some of the area's supply of residual fuel oil.

Summary

While PG&E speaks of the impact on PG&E's northern California gas distribution system in the event that its additional supplies of Canadian gas were temporarily or permanently lost the fact of the matter is that the loss of these additional FPC-approved purchases of Canadian gas would not have *any effect at all* on PG&E's deliveries of natural gas on cold winter design peak days until the winter of 1968-69 at the earliest. These additional Canadian gas purchases amount to less than 5%-10% of PG&E's total annual average gas supply from all sources, and any loss can readily be made up by additional purchases of California produced gas, or additional deliveries by El Paso Natural Gas Company of gas from West Texas and New Mexico sources.

Even if on the average PG&E's natural gas deliveries to northern California were to be curtailed by 5%-10%, *no natural gas consumer of PG&E's in northern California would be remotely*

affected. The only impact would be that PG&E's low-priority steam-electric generating plants (which presently consume over 30% of PG&E total gas supply) would have to burn residual fuel oil, which is in plentiful supply. Not only are there no restrictions on the burning of this substitute fuel, but large supplies are readily available and all of PG&E's steam-electric generating plants, including those at Pittsburgh and Antioch on the Sacramento River, are equipped to switch to burning residual fuel oil at the turn of a switch.

In sum, there is no factual basis upon which PG&E can be shown to suffer in the event that this Court were to set aside the certificate erroneously granted by the FPC and require both PG&E and FPC to re-examine the necessity, and the basis, for PG&E's present additional purchases of Canadian gas.

V THE ISSUES PRESENTED IN THIS PROCEEDING ARE NOT ONLY IMPORTANT FOR DISPOSITION HERE, BUT ALSO AS A GUIDE TO NEW APPLICATIONS TO THE FPC FOR CERTIFICATION OF ADDITIONAL LARGE CANADIAN GAS IMPORTS

Whatever the disposition of the case now presented to this Court for determination here, it is certain that the Court's determination will play an important part in determining what examination must be made, and what support must be found, by the FPC before it certifies any additional imports of natural gas from Canada. If this Court says that no investigation is required of any alternative means of delivering equivalent volumes of lower cost domestic supplies of natural gas from United States sources to the markets in question, it may be taken for certain that future Canadian import approvals will be issued by the FPC in a perfunctory manner with minimum record support and without a full investigation of the "public interest".

Thus, as in this instance, the FPC will be free to issue its certificate and import approval without taking into account:

- a) Any possible future discoveries or developments of natural gas supply in the marketing area sought to be served; or
- b) The availability of an equivalent volume of domestically produced gas at a lower delivered cost.

Needless to say, Court approval of any such course of future FPC action would be a continuing detriment to a vigorous consideration of the the public interest.

At the present time, in addition to the present proceedings, there are now before the FPC at least three important cases in which the question of certificating and approving additional imports from Canadian sources is presented for decision. These are:

Westcoast Transmission proceedings — wherein El Paso Natural Gas Company seeks permission to import 200,000 Mcf per day of natural gas from British Columbia at approximately 27¢ per Mcf (equivalent to about \$20 million a year) (Docket No's. G-8932, CP66-315).

This case is now submitted for decision to an FPC Presiding Examiner with the filing of briefs in December 1966.

Great Lakes Transmission proceedings — wherein Great Lakes Transmission seeks, among other things, to import 170,000 Mcf per day of natural gas from Alberta and Saskatchewan at approximately 27¢ per Mcf (equivalent to about \$17 million a year) (Docket No's. 66-10, et al.)

This case has now been reopened for further hearings before an FPC Presiding Examiner.

Pacific Gas Transmission proceedings — wherein PG&E's subsidiary seeks to import an *additional*

200,000 Mcf per day of natural gas from Alberta at approximately 29¢ per Mcf (equivalent to about \$21 million a year) (Docket No's. CP67-187, 188).

This case was filed with the FPC in December 1966 and hearings are expected to be held sometime this summer.

While in the first two of these, the Westcoast Transmission and Great Lakes Transmission proceedings there was a vigorous investigation and presentation of the available domestic supplies of natural gas and the possible "alternative means" of delivering these supplies to the U. S. markets involved, this was, and is, not the situation in the present, or the newly applied for applications filed by Pacific Gas Transmission to import additional supplies of Canadian gas for delivery into northern California.

In this latter case, unless compelled to do so by this Court, or by a "change of heart" on the part of the FPC, neither PG&E, nor its Pacific Gas Transmission subsidiary intends, to present in this forthcoming proceeding any testimony or evidence showing either: (1) The availability of any possible future discoveries of natural gas supply in the northern California marketing area which PG&E seeks to serve, or (2) The availability of an equivalent volume of domestically produced gas at a lower delivered cost.

Contrary to its position in other Canadian import proceedings the FPC here argues against a full investigation of the factors by which the "public interest" of the United States and of California can be measured. Unless *this* Court takes appropriate action in *these* proceedings to order that such an investigation be made, it will apparently never occur — at least insofar as Canadian natural gas imports into northern California are concerned.

SUMMARY AND CONCLUSION

In sum, the arguments presented by both the FPC, and PG&E here in opposition to the State of Texas, TIPRO, and the California gas producers amount only to a policy position that no investigation should be officially made and presented as a matter of record in these — or any other future — Canadian import proceedings.

If this point-of-view, espoused by the FPC and PG&E, is to prevail, it will mean that in all future Canadian import proceedings for deliveries of vast new quantities of Canadian gas into northern California, no account need be taken of either the availability of any possible future discoveries of natural gas supply in northern California, or the availability of an equivalent volume of domestically produced natural gas at a lower delivered cost. Such a policy would, of course, be disastrous to the long-term future of domestic natural gas production and supplies, as IPAA has pointed out.

It is with this in mind that the California gas producers ask that the FPC's decision in these proceedings be set aside, and new hearings ordered in the light of:

- 1) The FPC's failure to consider Pacific Gas and Electric Company's (PG&E's) estimated "cut-backs" of California produced gas in order to provide a market for the proposed importation of Canadian gas.
- 2) The FPC's failure to adequately consider the availability of alternative supplies of natural gas from El Paso and perhaps Transwestern.

Respectfully submitted,

HENRY F. LIPPITT, 2ND.,

Attorney for

California Gas Producers Association

*Independent Oil and Gas Producers
of California*

Jade Oil and Gas Company

February 20, 1967

626 Wilshire Boulevard

Los Angeles, California 90017

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HENRY F. LIPPITT, 2ND.

Attorney

FEDERAL POWER COMMISSION
WASHINGTON, D.C. 20426

IN REPLY REFER TO:

BNG-PL/SW
Pacific Gas Transmission
Company
Docket No. CP67-187

Pacific Gas Transmission Company
245 Market Street
San Francisco, California 94106

JAN 18 1967

Gentlemen:

Your application in the subject docket to expand your pipeline system and to import additional gas from Canada should be supplemented by the submittal of the following information:

- (1) List of all alternate sources, together with studies and explanations associated therewith, which you have considered before deciding to import additional gas from Canada.
- (2) Breakdown of the increase in proven gas reserves between November 1, 1964 and November 1, 1966 by type of contract. This should be shown for each category as in Exhibit H (2), Page 1.
- (3) Explanation as to the source of peaking gas shown in the graph on Exhibit I (2) (b), Page 6.
- (4) Workpapers in support of Exhibit I.

The requested information should be submitted within 30 days from the date of this letter; otherwise, the application would be subject to rejection under the provisions of Section 157.8 of the Regulations under the Natural Gas Act.

Very truly yours,

Secretary

APPENDIX "B"

Excerpt from Bulletin of Independent Natural Gas Association of America (Bulletin No. 974, November 19, 1964, Summary of FPC Hearing; Transwestern Pipeline Company, et. al., Docket No. CP63-204, et. al., covering sessions of October 7 through 9: long-term southern California gas needs).

There was next called Travis Petty, assistant controller of El Paso, whose original direct had involved system-wide and incremental costs and revenue estimates relating to the alternative proposals of El Paso. He also submitted a pro forma service agreement between his company and the Southern California Companies reflecting the proposed deliveries of an additional 250,000 Mcf/d.

Estimated system-wide net income from the 250,000 Mcf/d project was calculated to yield return on net gas plant investment of from 5.97% in 1964 to 6.73% in 1970, under the Petty calculations, which reflected operation and maintenance expenses based on 1962 experience, adjusted for known changes expected in subsequent years, and purchased gas costs based on prices in effect up to January 1, 1964 without reflecting future contractual escalations except those applicable in the San Juan Basin and for Canadian gas, the witness explaining he had assumed such 1¢ escalations called for in the San Juan contracts in 1964 and 1969 would be made permanently effective in view of the relatively low rates paid for gas in that area, but that contractual escalations in other areas from which El Paso purchases likely will not become permanently effective and may in fact be reduced.

He calculated that the average incremental cost attributable to delivery of the additional 250,000 Mcf/d during the 1968-70 period would be 19.77¢, including a 6-1/8% rate of return, and that the .75¢ per Mcf proposed rate reduction El Paso has agreed to if the 250,000 Mcf/d project is approved would result in a total saving of \$34,000,000 to the company's customers.

His figures for the 575,000 Mcf/d project showed estimated system-wide rates of return over the 1963-70 period were about the same as for the 250,000 Mcf/d project; average incremental cost of the additional 575,000 Mcf/d, 1968-70, 21.98¢ per Mcf, including the 6-1/8% return; total savings to customers from the 1¢ rate reduction, assuming certification, \$47,800,000.

Another calculation by Mr. Petty estimated average cost of transporting 865,000 Mcf/d, during the period 1968-70, from the California border to the Los Angeles area at 3.04¢ per Mcf, including the same return figure, and including El Paso's incremental cost of delivering 575,000 Mcf/d and Transwestern's incremental cost of delivery 290,000 Mcf/d both to the California border, the total incremental unit cost for delivery of the 865,000 Mcf/d to Los Angeles was estimated at an average of 25.86¢ per Mcf for the 1968-70 period, with the unit cost of delivery to Los Angeles on a rolled-in basis averaging 33.73¢ per Mcf during the same period. All his figures were on a 14.73 psia basis.

Before being cross-examined, Mr. Petty gave supplemental direct, in which he sponsored some revised exhibits which he said were to give effect to the "changed circumstances that have been described by (El Paso President) Mr. Boyd." He said the revisions updated the previously-sponsored exhibits giving effect to more current information.

As a result of these changes, he said, the estimated average cost per Mcf of the 250,000 Mcf/d project is 20.57¢ in 1968, 20.69¢ in 1969, and 20.05¢ in 1970 at load factors of 91.66%, 94.74% and 98.3%, respectively, and the average for the total volume over the three years is 20.43¢ at the average load factor of 94.9%, all figures being on a 14.9 psia basis, the last figure converting to 20.2¢ per Mcf on a 14.73 psia basis; for the 575,000 Mcf/d project, the new figures were given as cost per Mcf 22.66¢ in 1968, 23.01¢ in 1969 and 22.69¢ in 1970 @ 14.9 psia and 95% load factor, the average for the three years being 22.79¢ @ 14.9 psia, or 22.53¢ @ 14.73 psia; for the 865,000 Mcf/d project, the costs per Mcf @ 14.9 psia are estimated at 3.04¢ in 1968, 2.99¢ in 1969 and 2.93¢ in 1970, for an average of 2.99¢ @ 14.9 psia, or 2.96¢ @ 14.73 psia. He also indicated minor changes in the estimated savings to customers as a result of the contemplated rate reductions.

EL PASO NATURAL GAS COMPANY

Cost of Service Based Upon a 6-1/8% Rate of Return
for the Years 1968 Through 1970

Attributable Solely to the Proposed Facilities

250 M2CF/D Proposal

<u>Line</u> <u>No.</u>	<u>Description</u> (a)	<u>1968</u> (b)	<u>1969</u> (c)	<u>1970</u> (d)	<u>Line</u> <u>No.</u>
	<u>Cost of Service</u>				
1	Other Gas Supply Expense	\$ 6,524,847	\$ 6,973,123	\$ 7,007,345	1
2	Production and Gathering Expense	4,064,587	4,187,684	4,191,082	2
3	Products Extraction Expense	1,947,718	1,959,365	1,958,633	3
4	Transmission Expense	1,542,938	1,548,232	1,548,232	4
5	Administrative and General Expense	418,493	418,455	418,455	5
6	Taxes Other than Federal Income Tax	927,244	949,816	948,832	6
7	Depreciation and Depletion	2,711,898	2,724,653	2,720,979	7
8	Federal Income Tax	1,344,704	1,231,789	1,113,362	8
9	Return at 6-1/8%	2,784,478	2,617,984	2,451,212	9
10	Revenues Credited	<u>(4,149,060)</u>	<u>(4,140,175)</u>	<u>(4,154,864)</u>	10
11	Total Cost of Service	<u>\$18,117,847</u>	<u>\$18,470,926</u>	<u>\$18,203,268</u>	11
12	Sales in MCF at 14.9 p.s.i.a.	<u>91,500,000</u>	<u>91,250,000</u>	<u>91,250,000</u>	12
13	Cost per MCF	<u>19.80c</u>	<u>20.24c</u>	<u>19.95c</u>	13
	<u>Rate Base, Return and Federal Income Tax</u>				
14	Average Gas Plant in Service	\$50,442,000	\$50,442,000	\$50,442,000	14
15	Average Reserves for Depreciation and Depletion	<u>6,166,514</u>	<u>8,884,790</u>	<u>11,607,606</u>	15
16	Net Plant	<u>\$44,275,486</u>	<u>\$41,557,210</u>	<u>\$38,834,394</u>	16
17	Working Capital	<u>1,185,387</u>	<u>1,185,387</u>	<u>1,185,387</u>	17
18	Rate Base	<u>\$45,460,873</u>	<u>\$42,742,597</u>	<u>\$40,019,781</u>	18
19	Return at 6-1/8%	\$ 2,784,478	\$ 2,617,984	\$ 2,451,212	19
20	<u>Less: Tax Deductions</u>	<u>1,543,213</u>	<u>1,480,948</u>	<u>1,423,493</u>	20
21	Balance of Return	<u>\$ 1,241,265</u>	<u>\$ 1,137,036</u>	<u>\$ 1,027,719</u>	21
22	Federal Income Tax (108.33333%)	<u>\$ 1,344,704</u>	<u>\$ 1,231,789</u>	<u>\$ 1,113,362</u>	22

Note: As testified to by El Paso witness Petty (Assistant Controller) at page 12, Question and Answer 26 of his Prepared Testimony, "as shown on line 13 the cost per Mcf is 19.80¢ in 1968, 20.24¢ in 1969, and 19.95¢ in 1970 at 14.9 psia. The average is 20.00¢

Docket No. CP64-76
 Exhibit 128 (TP-5)
 Schedule No. 6
 Sheet 1 of 1
 Witness: Petty

EL PASO NATURAL GAS COMPANY

Cost of Service Based Upon a 6-1/8% Rate of Return
 for the Years 1968 Through 1970

Attributable Solely to the Proposed Facilities

575 M²CF/D Proposal

Line No.	Description (a)	1968 (b)	1969 (c)	1970 (d)	Line No.
	<u>Cost of Service</u>				
1	Other Gas Supply Expense	\$ 20,258,679	\$ 21,214,927	\$ 21,275,921	1
2	Production and Gathering Expense	6,669,190	6,649,427	6,652,624	2
3	Products Extraction Expense	2,748,343	2,753,845	2,732,483	3
4	Transmission Expense	1,440,368	1,445,658	1,445,673	4
5	Administrative and General Expense	692,677	692,607	692,615	5
6	Taxes Other than Federal Income Tax	2,137,654	2,152,920	2,150,957	6
7	Depreciation and Depletion	5,890,971	5,844,061	5,836,721	7
8	Federal Income Tax	2,776,894	2,542,687	2,324,007	8
9	Return at 6-1/8%	7,550,095	7,190,709	6,832,985	9
10	Revenues Credited	<u>(5,837,404)</u>	<u>(5,822,088)</u>	<u>(5,846,139)</u>	10
11	Total Cost of Service	<u>\$ 44,327,467</u>	<u>\$ 44,664,753</u>	<u>\$ 44,117,847</u>	11
12	Sales in MCF at 14.9 p.s.i.a.	<u>199,927,500</u>	<u>199,381,250</u>	<u>199,381,250</u>	12
13	Cost per MCF	<u>22.17c</u>	<u>22.40c</u>	<u>22.13c</u>	13
	<u>Rate Base, Return and Federal Income Tax</u>				
14	Average Gas Plant in Service	\$134,207,000	\$134,207,000	\$134,207,000	14
15	Average Reserves for Depreciation and Depletion	<u>14,053,753</u>	<u>19,921,268</u>	<u>25,761,660</u>	15
16	Net Plant	\$120,153,247	\$114,285,732	\$108,445,340	16
17	Working Capital	<u>3,113,602</u>	<u>3,113,602</u>	<u>3,113,602</u>	17
18	Rate Base	<u>\$123,266,849</u>	<u>\$117,399,334</u>	<u>\$111,558,942</u>	18
19	Return at 6-1/8%	\$ 7,550,095	\$ 7,190,709	\$ 6,832,985	19
20	<u>Less: Tax Deductions</u>	<u>4,986,808</u>	<u>4,843,613</u>	<u>4,687,748</u>	20
21	Balance of Return	<u>\$ 2,563,287</u>	<u>\$ 2,347,096</u>	<u>\$ 2,145,237</u>	21
22	Federal Income Tax (108.33333%)	<u>\$ 2,776,894</u>	<u>\$ 2,542,687</u>	<u>\$ 2,324,007</u>	22

Note: As testified to by El Paso witness Petty (Assistant Controller) at page 16, Question and Answer 35 of his Prepared Testimony, "as shown on line 13...the cost per Mcf is 22.17c in 1968, 22.40c in 1969, and 22.13c in 1970 at 14.9 psia. The average is 22.23c which is equivalent to 21.98c per Mcf at 14.73 psia.

See Vol. 3386

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21308

RONALD E. GATES,
Appellant,

vs.

P. F. COLLIER, INC., a Delaware Corporation,
Appellee.

PETITION FOR REHEARING

LODGED

JUL 13 1967

SHIRO KASHIWA
401 Trustco Building
Honolulu, Hawaii 96813
Attorney for Appellant

WM. B. LUCK, CLERK

AUG 2 1967

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<i>Licznanski v. United States</i> , (C.C.A. 3) 180 F.2d 862	3
<i>Pearson v. Northeast Airlines</i> , (C.C.A. 2) (1962) 309 F.2d 553, 92 A.L.R. 2d 1162	14
<i>Pinney v. Nelson</i> , 183 U.S. 144, 22 S. Ct. 52	13
<i>Tiffany v. Boatman's Sav. Inst.</i> , 18 Wall. (U.S.) 375	3

OTHER AUTHORITIES

17 Am. Jur. 2d 530	3
Annotation 126 A.L.R. 685	3
Japanese Foreign Exchange Law:	
Articles 27, 29, 30	4, 6, 7, 8, 10
Articles 42, 43, 44	9
Japan-United States Treaty, Article XIX (June 22, 1960)	2, 3, 4, 6, 11

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21308

RONALD E. GATES,
Appellant,

vs.

P. F. COLLIER, INC., a Delaware Corporation,
Appellee.

PETITION FOR REHEARING

Comes now the plaintiff-appellant, Ronald E. Gates, by his attorney and files this Petition for Rehearing of Judgment entered by the Court on June 14th, 1967, affirming the judgment of the court below.

Plaintiff-appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself solely to certain features wherein he believes the Court may be convinced its opinion is incorrect.

I

**Errors Relating to Violation of Foreign Exchange Law
of Japan**

The Court erred in its failure to hold that the contracts were violations of the Japanese Foreign Exchange and Foreign Trade Control Law of Japan, for the following reasons.

A. The U. S. Military Personnel Sales (96B) Portion of the Contract Was Illegal under the Japanese Foreign Exchange Laws.

This Court interposed Article XIX of the Treaty between Japan and the United States which became effective June 22nd, 1960. (Said Article XIX is fully quoted in footnote 1¹.) The date of the contract in this case was April 15th, 1960. So for 78 days the contract was admittedly illegal. This court tried to minimize this illegality by stating that there was "no showing of any remittances of sums collected from armed forces personnel during the interval after the date of signature". There were sales and remittances under 96B accounts starting from April, 1960. See Defendant's Exhibit R40, Form 70s on 96B for April, '60-October, '62. (Tr. 890). See also Defendant's Exhibits R39, R37, R43. That there were sales and remittances under the April, 1960 contract immediately is understandable in that the April 15th, 1960 contract was a continuation by appellant Gates of what R. E. Gates & Son Co. did under said Gates & Son Co. contract with Collier dated May 1st, 1959. See Plaintiff's Exhibit 4 in Evidence. (Tr. 67, 239).

1.

ARTICLE XIX

1. Members of the United States armed forces, the civilian component and their dependents, shall be subject to the foreign exchange controls of the government of Japan.

2. The preceding paragraph shall not be construed to preclude transmission into or outside of Japan of the United States dollars or dollar instruments representing the official funds of the United States or realized as a result of service or employment in connection with this agreement *by members of the United States Armed Forces and the civilian component*, or realized by such persons and their dependents from sources outside of Japan.

3. The United States authorities shall take suitable measures to preclude the abuse of the privileges stipulated in the preceding paragraph or circumvention of the Japanese foreign exchange controls.

The important thing is that as of April 15th, 1960 the agreement was an agreement to do an illegal act. Such agreements are illegal. *Ewell v. Daggs*, 108 U.S. 143, 2 S. Ct. 408; *Tiffany v. Boatman's Sav. Inst.*, 18 Wall. (U.S.) 375. Plaintiff's Exhibit 9 dated April 1, 1960 clearly provided on page 3 with relation to the Japanese Bank Account in Tokyo that "The dollars collected are not to be deposited to this account, *but should be remitted together with Form 163*. By doing so, our Import License would not be effected."

Furthermore it is the rule supported by most authorities that where an agreement is entered into in violation of a statute, the subsequent repeal or modification thereof does not make the agreement valid. *Fitzsimmons v. Eagle Brewing Co.*, (C.C.A. 3) 107 F.2d 712, 126 A.L.R. 681. And the ground upon which this rule is based is that since the agreement never had a legal existence, the repeal or modification does not restore to it any validity. *Hannay v. Eve*, 3 Cranch (U.S.) 242, 2 L.Ed. 427; *Licznanski v. United States*, (C.C.A. 3) 180 F.2d 862; *Fitzsimmons v. Eagle Brewing Co.* (supra). See Annotation 126 A.L.R. 685 and 17 Am. Jur. 2d 530.

Appellant Gates further submits that said Article XIX of the Japan-United States Treaty does not permit Collier's Tokyo Branch Office to transmit United States dollars to New York. The evidence is clear in this case that up to April 1st, 1962 the collections for sales to Military personnel sales went to the Collier Tokyo Office. See Plaintiff's Exhibit 6 which changed this to direct mailing to New York after April 1st, 1962. Once Collier Tokyo Branch received these United States dollar amounts, the only lawful thing which Collier Branch Office could have done with said dollars received was to deposit said amount in a bank in Tokyo which would naturally convert the amounts into yen. To ship such amounts converted into yen into United

States Dollars it had to be licensed to convert said yen into United States Dollars. Colliers did not choose to follow this legal step, but chose to illegally mail out the dollar amounts collected direct to New York (in kind or in checks). It is submitted that Collier Tokyo Branch was not ever permitted under said Article XIX to send dollars out of Japan, permission to send out dollar amounts is only permitted "*by members of the United States Armed Forces and their civilian component.*" It was never intended that Collier's Tokyo Branch Office be granted the privileges of said Article XIX.

This Court further failed to consider the following most important point raised by appellant in his opening brief pages 22 to 24. Articles 27, 29 and 30, the Japanese Foreign Exchange Law (Plaintiff's Exhibit 98, pages AA 8-9) provided:

"Article 27. Unless authorized as provided for in this law or in Cabinet Order, no person shall in Japan:

(2) . . . receive any payment from an exchange non-resident."

"Article 29. Unless authorized as provided for in this law or in Cabinet Order . . . no exchange resident shall abroad receive any payment from . . . an exchange resident as a consideration or association with surrender of any value abroad."

"Article 30. No person may be a part to creation, modification, liquidation, settlement, or direct or indirect transfer of the following items or to any other transaction of the same, unless authorized as provided for by cabinet order;

2) Foreign claimable assets between exchange residents;

3) Claimable assets between an exchange resident and an exchange non-resident."

Gates, plaintiff-appellant, was an exchange resident. Colliers in New York City was an exchange non-resident. (See page 18 of Opening Brief for definitions of "Exchange Residents," "Exchange Non-Residents" and "Claimable Assets") In the Opening Brief at pages 22-23, Gates stated as follows:

"The contracts of April, 1960 and September, 1961, covered sales to Military personnel under 96B accounts. The 'Outline of Procedure for Opening Tokyo Branch' Plaintiff's Exhibit 9 in Evidence clearly covered Dollar Sales as well as yen sales. (Tr. 81) Paragraph 5(e), page 2, differentiates the two and the Dollar sales were supplied with an 'imprest fund' at the Long Island Trust Co., Garden City Park, L. I., N. Y., on which Gates had the power of attorney to draw to pay commissions due him on these Dollar Sales. (Tr. 90)

The documentary evidence in this case, Plaintiff's Exhibits 109 and 110 in Evidence, shows that 'P. F. Collier Inc., Japan Branch, Tokyo, Japan' had a checking account at said Long Island Trust Co., Long Island, New York and checks were drawn on said account from Tokyo by Gates and said Exhibit 110 shows that the checks drawn by Gates were deposited at the First National City Bank of New York, Wells Fargo Bank of San Francisco and the Chemical Bank of New York. The endorsements clearly show this. The funds for the imprest fund at Long Island were deposited by Colliers.

Based on Plaintiff's Exhibit 75 in Evidence, a document prepared by Colliers as Evidence and presented to the Tokyo District Court, the total amount remitted in this manner from April, 1960 to May 1, 1960, amounted to:

\$ 97,452.00	
348,082.40	(Tr. 892, modified by stipulation)
<hr/>	
\$445,534.40	

The 34% commission paid to Gates according to said Exhibit 75 was:

\$ 31,342.77
90,313.63
<hr/>
\$121,656.40

And the total 7% commission paid to Gates was:

\$ 86.78
9,731.33
<hr/>
\$9,818.11

These sums were not insignificant. It is submitted that the 96B (Military) portion of the contracts were clear violations of the Japanese Foreign Exchange Laws."

It is submitted the contract and the Exhibits above referred clearly contemplated a free flow of funds abroad from an exchange non-resident (Colliers in New York) to an exchange resident (Gates), all in absolute disregard of said Articles 27(2), 29 and 30(2)(3) above quoted of the Japanese Foreign Exchange Laws. A careful reading of the said Japanese Law as well as Article XIX above quoted of the Treaty shows that the law has to do as much with the inflow of funds as well as outflow of funds from Japan. This court in its opinion only concerned itself with the outflow portion and did not concern itself with the control of inflow of funds into Japan by controlling the receipt of funds abroad by exchange residents. It is understandable that a country like Japan would impose such restrictions or directions upon its exchange residents to obtain the maximum inflow of funds into Japan. Colliers and Gates violently and openly violated said Articles 27(2), 29 and 30(2)(3) having to do with inflow to the writer of this brief who has much to do with the Japanese Foreign Exchange Law in his daily practice. it is unimaginable how

Colliers and Gates, seeking the privilege to do business in Japan can arbitrarily disregard the restrictions in said Articles 27(2), 29 and 30(2) and (3).

Therefore it is submitted that for the above reasons this court reconsider its decision regarding the legality of the 96B portion (Military Personnel Sales) of the contract under the Japanese Foreign Exchange Law.

B. The Japanese Civilian (97B) Portion of Contract Was Also Illegal under the Japanese Foreign Exchange Laws.

With relation to the Japanese Civilian portion of the Contract (97B) on page 19 of the opening brief it was stated as follows:

“ . . . Defendant’s counsel admitted that Colliers paid Gates within the United States in or about the latter half of 1961 the sum of \$18,834.24 (U.S. Dollars) on account of the 12½% commission due (Tr. 385-387). See also Plaintiff’s Exhibit 93 in Evidence confirming the above illegal payments. Plaintiff’s Exhibit 75 shows 7% bonus payments of \$262.05 and \$23,357.49. All of these were clear violations of Article 27 above recited.”

Here again Articles 27(2), 29 and 30(2)(3) aforementioned were violated. Gates (an exchange resident) cannot receive in New York such sums from Colliers in New York (an exchange non-resident).

The Court makes much of the lack of proof of cost but the important thing was the following. Under the contract the following was the split:

Gates rights (59.5%)

34%	.....	\$84.83
7%	.....	17.47
5%	.....	12.50

12.5%	33.69	
1%	2.70	\$151.19
<u>Colliers rights (40.5%)</u>		
40.5%	118.31	118.31
Total 100%	Total	\$269.50

These figures are admitted figures because the contract percentages are used and the stipulated sales price of \$269.50 is used. Based on the above figures and percentages the only mathematical explanation of the manner in which every \$172.00 sent from Tokyo to New York was as follows:

Colliers Rights

40.5%	\$118.00	\$118.00
-------	----------	----------

Gates Rights

12.5%	34.00	
7%	17.00	
1%	3.00	54.00
	Total	\$172.00

The foregoing is true by Defendant's own admission. As stated on page 19 of the Opening Brief

" . . . Defendant's counsel admitted that Colliers paid Gates within the United States in or about the latter half of 1961 the sum of \$18,834.24 (U.S. Dollars) on account of the 12½% commission due (Tr. 385-387). See also Plaintiff's Exhibit 93 in Evidence confirming the above illegal payments. Plaintiff's Exhibit 75 shows 7% bonus payments of \$262.05 and \$23,357.49. All of these were clear violations of Article 27 above recited."

Therefore here again there was a violation of said Articles 27(2), 29 and 30(2)(3). Plaintiff-appellant could not receive such sums in New York without violating the said

Articles. The trial court and this Appellate Court as above stated were only concerned with the outgo of funds from Japan. The Court completely missed the point that these foreign exchange laws control the inflow of funds as well. Exchange Residents in Japan must receive a permit or license to receive funds abroad. This was not done and it is submitted that this Court erred in not giving any consideration to this very important point.

C. The Contracts Were Service Contracts Which Required Prior Approval.

On pages 24 and 25 of the Opening Brief it was argued as follows:

"Under Articles 42, 43 and 44 of the Japanese Foreign Exchange Laws, the contracts of April, 1960 and September, 1961, were required to be approved by the Minister of Finance. Sections 42, 43 and 44 of Plaintiff's Exhibit 98 in Evidence are quoted in the footnote below.⁵

No such approvals were obtained in the present case (Tr. 987). It is easy to defeat the purpose of these exchange laws by contracting for services and scheming to be paid therefor by illegal transactions above outlined in paragraphs A and B. The very pur-

5. Articles 42, 43 and 44 read as follows:

"Article 42. Unless authorized as provided for by Cabinet Order, no person shall contract for services *involving payment, settlement or any other transaction governed by the provisions of this law.*"

"Article 43. Unless authorized as provided for by Cabinet Order, no exchange resident shall render services to an exchange non-resident unless an adequate payment is provided in accordance with the provisions of this Law."

"Article 44. Any person or exchange non-resident as specified in the preceding two Articles may be required to obtain prior approval from or present certification of adequate payment to the competent Minister as provided for by Cabinet Order."

pose of Articles 42, 43 and 44 was to prevent what Colliers engineered in this case.

It is submitted that here again the Japanese Foreign Exchange Law was violated."

The contracts in this case were obviously service contracts. And the service involved "*payment, settlement or any other transaction governed by the provisions of the Foreign Exchange Law.*" As above stated both the military (96B) and Japanese Civilians (97B) portions involved receipt of funds by Gates in the United States. These payments clearly involved Articles 27(2), 29 and 30(2)(3)—they were governed by said Articles but Collier and Gates disregarded said Articles.

Since no approvals were obtained (Tr. 937) the contract is invalid.

This simple point but fatal was presented in the trial court and again in this Court but both courts have chosen to side-step this issue. We ask that this court rule on this simple point upon rehearing.

D. Illegal to Send Book Orders from Tokyo to New York.

At page 25 of the Opening Brief Plaintiff-appellant stated as follows:

"The next violation was the sending out of Tokyo to New York the Yen or U.S. Dollar book orders so that Collier may borrow on said orders from its New York banks. Under Article 45 of said Foreign Currency Control Law which reads as follows:

"Article 45. Unless authorized as provided for by Cabinet Order, no person may export or import means of payment precious metals, securities, or documents embodying rights to claimable assets." these yen book orders exported were clearly "documents embodying rights to claimable assets." There

is ample evidence in this case that these book orders were sent out. In fact, Colliers requested in writing that the original be sent to New York. (Tr. 985) (Plaintiff's Exhibit 126 in Evidence)"

Both under the Japanese Civilian (97B) and Military (96B) these book orders were shipped out without proper licenses. Article XIX of the Treaty between Japan and the United States heretofore quoted is not a defense under the 96B shipments because the shipper is Colliers who is not a member of the military forces. Neither is such document a dollar instrument.

This point was raised in the trial court and again before this court. Shouldn't it be answered in a rehearing?

II

Rehearing Based on Other Grounds

A. Court Erred in Granting Attorney's Fees.

In a most recent case of the Supreme Court of the United States, *Fleischman's Distilling Corp. v. Maier Brewing Co.*, U.S., 87 S. Ct. 1404 (Decided May 8th, 1967), held, at page 1407 with relation to the granting of attorney's fees as follows:

"The rule here (United States) has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.— In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponent's counsel."

The court below erroneously allowed \$25,000.00 for attorney fees and \$11,011.99 for travel expenses. Upon

a rehearing based on the Fleischman's holding above, the attorney fees and travel expenses should be deleted.

B. Even If the Center of Gravity Rule Applies, Hausman v. Buckley Applies.

It is submitted that even if the center of gravity rule is applied, this court did not answer nor decide the following argument made by plaintiff-appellant at pages 14 to 16 of the Reply Brief.

It was there argued as follows:

Appellee Collier attempts to argue that the "center of gravity" or "grouping of contracts" rule should govern this case (Ans. Br. 23). But in the very jurisdiction (N.Y.) Appellant Collier says the laws whereof should apply, the "center of gravity" or "grouping of contracts" rule is subject to a recognized exception that when the parties contract with the law (Statutory) of some particular jurisdiction in view, the law of that jurisdiction will be applicable in determining the interpretation and validity of the contract, as the law which the parties presumably intended to be controlling. *Hausman v. Buckley*, (C.C.A. 2) (1962) 299 F.2d 696, 93 A.L.R. 2d 1340. In the said case, a derivative action by a minority shareholder of a Venezuelan Corporation was dismissed for the following reasons:

"... Thus defined, we think it is clear that Appellants' position cannot prevail. A rule which provides that the enforcement of corporation claims through derivative actions must be undertaken pursuant to the will of a majority of its stockholders reflects a deliberate policy that such actions ought to be brought not only when the claims may have merit but when the stockholders, as a body, are of the opinion that the corporate welfare is best promoted by suing upon them. The

issue is not just 'who' may maintain an action or 'how' it will be brought, but 'if' it will be brought." . . .

"'But a statute of the place where the right arose may impose upon it a condition which goes to its substance, and, when this is so, the condition will be observed elsewhere. This has ordinarily come up in the case of statutory rights in which the limitation was imposed by the same statute which created the right itself. . . . But it is not necessary that the limitation should be in the same statute, so the purpose be plain to make it a condition.' *Wood & Selick, Inc. v. Compagnie Generale Transatlantique*, 43 F.2d 941, 942-943 (C.C.A. 2, 1930) (L. Hand, J.)." (Emphasis ours)

See also:

Pinney v. Nelson, 183 U.S. 144, 22 S. Ct. 52.

Levy v. Daniels U-Drive Auto Renting Co., (1928) 108 Conn. 333, 143 Atl. 163.

Bradford Electric Light Co., v. Clapper, (1932) 286 U.S. 145, 52 S. Ct. 571 (Rt. by way of defense).

Broderick v. Rosner, 294 U.S. 629, 55 S. Ct. 589.

Broderick v. McGuire, (1934) 119 Conn. 83, 174 Atl. 314.

In the present case the contract contemplated sales in Japanese Yen and it contemplated conversion of said yen into U. S. Dollars. As admitted by the parties, an Import License was absolutely necessary and the Japanese Foreign Exchange Control Act was interwoven in the contract. Charges of fraud by Colliers necessarily involved defenses by Gates involving the said Exchange Act. See arguments VI (B) (C), pages 49-61, Op. Br. Both of the Japan Sales Contracts between Gates and Colliers would have been useless if Colliers couldn't get U. S. Dollars out of Japan. The Japanese Foreign Exchange Act was the backbone of the Tokyo contract and it was as much a part of

the contract as the law of Venezuela was with relation to shareholder's rights of Venezuelan corporations in *Hausman v. Buckley* abovementioned. Where foreign statutes are involved the courts will enforce the foreign statutes together with the law of that country (Japanese law in the present case).

The foregoing exception stated in *Hausman v. Buckley* applies to tort cases as well. See: *Bradford Electric Light Co. v. Clapper*, *supra*; *Pearson v. Northeast Airlines*, (C.C.A. 2) (1962) 309 F.2d 553, 92 A.L.R. 2d 1162.

This Court did not even attempt to answer this well known exception.

And if the Japan Law applies, shouldn't the case be mandated to the Court below so that the Japanese law may be properly proven and applied? At page 5 of the opinion much is said regarding a "mandatory" but nothing prohibits a debtor-creditor relationship between a mandator and a mandatory. It is undenied that there was a debtor and creditor relationship between Gates and Colliers (Op. Br. 54-55). A mandate relationship mixed with a debtor and creditor relationship is not one which any court may settle in a footnote. Such issues should be only settled by a remand to the court below.

C. Tokyo District Court Pro-Tem Decree Matter Not Decided.

Appellant on pages 39-42 of Opening Brief contended that certain books were sold under a court order—the questions of law raised in said argument are not answered at all.

**D. Colliers Rescinded Its Contract of September 1961
and Cannot Sue for Future Liabilities to Arise under
Said Contract After Rescinding Contract.**

Appellant on pages 60-62 of his Opening Brief submitted an argument to show that when one terminates a contract, said contract is annihilated and future liabilities after date of annihilation, under said annihilated contract cannot be recovered. The legal questions presented in said argument haven't been solved by this court.

Wherefore, upon the foregoing grounds, and for other reasons, appearing in Appellant's Briefs, it is respectfully submitted that a rehearing be granted in the matter, and that the mandate of this Court be stayed pending the disposition of this petition.

Counsel represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

Respectfully,

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Attorney for Appellant

July, 1967

